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THE
Ontario Law Reports

CASES DETERMINED IN THE SUPREME COURT
OF ONTARIO (APPELLATE AND HIGH
COURT DIVISIONS).

1929

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JUDGES
OF THE
SUPREME COURT OF ONTARIO

DURING THE PERIOD OF THESE REPORTS.

APPELLATE DIVISION.

First Divisional Court.

THE RIGHT HON. SIR WILLIAM MULOCK, K.C.M.G., P.C., C.J.O.
THE HON. JAMES MAGEE, J.A.
“ “ FRANK EGERTON HODGINS, J.A.
“ “ WILLIAM EDWARD MIDDLETON, J.A.
“ “ DAVID INGLIS GRANT, J.A.

Second Divisional Court.

THE HON. FRANCIS ROBERT LATCHFORD, C.J.
“ “ WILLIAM RENWICK RIDDELL, J.A.
“ “ CORNELIUS ARTHUR MASTEN, J.A.
“ “ JOHN FOSBERY ORDE, J.A.
“ “ ROBERT GRANT FISHER, J.A.

HIGH COURT DIVISION.

THE HON. RICHARD MARTIN MEREDITH, C.J.C.P., President.
“ “ HUGH THOMAS KELLY, J.
“ “ HUGH EDWARD ROSE, J.
“ “ WILLIAM ALEXANDER LOGIE, J.
“ “ WILLIAM HENRY WRIGHT, J.
“ “ JOHN MILLAR McEVoy, J.
“ “ WILLIAM EDWARD RANEY, J.
“ “ NICOL JEFFREY, J.
“ “ CHARLES GARROW, J.

MEMORANDA.

APPOINTMENT TO THE BENCH.

12th September, 1929.

Charles Garrow, of the City of Toronto, in the Province of Ontario, Esquire, of Osgoode Hall, one of his Majesty's counsel for the Province of Ontario, to be a Judge of the High Court Division of the Supreme Court of Ontario and *ex officio* a Judge of the Appellate Division of the said Court.

CALLED TO THE BAR.

19th September, 1929.

Edward Austin Carroll, Cecil William Robinson, Charles Gordon Page, Frances Armstrong Milne, Donald Harrison McTaggart, Kenneth James Matheson, Helen Grossman, Samuel Alden German, Alexander Bissett, John Dickson Currie, Harold Lally Daufman, Henry Joseph Donley, Onie Brown, Frederick Murray Catzman, Hubert Holmes Craig, Gordon Douglas Watson, Hugh John Plaxton, Eugene Edward Hawke, Charles Harold Kemp, Abraham Lavine, John Joseph Riordon, Hector Alexander Stewart, John Thomson, Brian William Doherty, Mayer Lerner, Edwin Wilfrid Rush Hugh Ernest Fleming, Ernest Cecil Facer, George Leslie Mitchell, Gerald Fullerton Smith, Francis Ernest Neylan, Roydon Ambrose Hughes, Charles Henry Woods, Charles Blake.

17th October, 1929.

Maurice David Heller, Manuel Godfrey, Charles Moore Ricketts, Ross Croft Taylor, Margaret Mary Sullivan, David Sher, Joseph Aloysius Kennedy, John Girdlestone Hungerford, Robert Hampden Logan, Joseph Rosenfeld, James Clifford Adams, Wilfrid Slater Lane, Joseph Rabinovitch, Jean Thomas Richard, Leo Donnelly, Wilfred Sarsfield Martin.

21st November, 1929.

Herbert Lovell Joy, Philip Davidson, Annie Epstein, Harry Samuel Mandell, Millard James Grant, Robert Webster Andrew, Alexander Foster Burritt, Frank Raphael Dore, Elmer Thomas Duggan, John Elliott, Frank Oliver Gallagher, Robert Frank Hardy, Harold John King, William Carlyle Lewies, Charles Scott Martin, Eldon Wilkinson Mitchell, Angus McMillan, Florence Margaret Sexton, David John Rankin, Evan Robertson Peacock, Harry Leslie Wright, Donald Henderson Grant, Herbert Orloff, Louis Taube, Beatrice Olsen Van Wart, Horace Hume Van Dyke Van Wart, Paul Augustine Copeland, Nelson McFarlane, John Fraser Ross Douglas, William Gerald Harding Jephcott.

16th January, 1930.

Clifton Harper Lane, Wilfred Wolman, John Edward Milne, John Hood (special—Nova Scotia), Erskine Wallace Ireland (Manitoba).

20th February, 1930.

William Alfred James Case.

ERRATA.

Page 126, 9th line from top, *delete* "the late."

In *Westgate v. Harris*, 358, in the argument at p. 360, it should have been stated that counsel for the appellants relied on *Foster v. Driscoll* (1928), 45 Times L.R. 185, now reported also in [1929] 1 K.B. 470.

Page 399, 14th line from top, *for* "5" *read* "573."

Page 596, strike out 6th line from bottom and put a period instead of a comma at the end of 7th line from the bottom.

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REPORTS OF CASES

DETERMINED IN THE

SUPREME COURT OF ONTARIO

(APPELLATE AND HIGH COURT DIVISIONS.)

[APPELLATE DIVISION.]

RE REX v. ECKER.

1929.

RE REX v. FRY.

April 5.

Criminal Law—Police Magistrate—Jurisdiction—Incomplete Trial—Fresh Informations—Autrefois Acquit or Convict—Prohibition.

The accused were charged with offences alleged to have been committed in the county of H., and brought before a police magistrate having jurisdiction in that county. They elected to be tried summarily, and evidence was taken before the magistrate, but the trial was not completed and no conviction or order was made. The magistrate simply adjourned the case; and, the Crown having learned that the offences were committed, if at all, in the county of W., laid fresh informations for offences committed in W., and the same magistrate, who had jurisdiction there also, was proceeding to try the accused, when he was prohibited by the order of a Judge:—

Held, on appeal, that, as the first trial had not been concluded by a conviction or acquittal, the accused were not put in jeopardy twice for the same offences, and a plea of *autrefois acquit* or *autrefois convict* could not prevail.

The order of the Judge was therefore reversed.

APPEALS by the Police Magistrate for the Counties of Haldimand and Welland from orders made by ROSE, J., in Chambers, prohibiting the magistrate from proceeding to try the defendants upon informations for offences alleged to have been committed in the county of Welland, upon the ground that the magistrate had no jurisdiction, because the defendants had previously been acquitted upon informations laid in respect of the same offences, then alleged to have been committed in the county of Haldimand.

March 6. The appeals were heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

Edward Bayly, K.C., for the appellant, argued that the trial of the accused had never been concluded. Consequently they had

App. Div. never been acquitted or convicted, and so the plea "*autrefois acquit*" or "*autrefois convict*" could not be made on their behalf. Therefore prohibition had been improperly granted. Reference to Roscoe's Criminal Evidence, 15th ed., pp. 260, 262, 263; *Rex v. Chew Deb* (1913), 21 Can. Crim. Cas. 20.

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R. S. Colter, K.C., for the defendants, respondents, contended that the procedure advocated by the Crown was an attempt to place these defendants in jeopardy a second time, and should not be permitted.

At the conclusion of the argument THE COURT gave judgment allowing the appeals.

Subsequently written reasons for the judgment were given as follows:—

April 5. LATCHFORD, C.J.:—At the close of the argument at bar, I delivered orally the judgment of the Court that, for reasons which were fully stated, the appeals must succeed. As the point involved, while not new, seems of sufficient importance to be reported, it is desirable to restate the main ground, at least, for allowing the appeals.

The facts were not in dispute. Fry and Ecker, on the 15th November, 1928, stood charged before Police Magistrate Massie, in the county of Haldimand, where the magistrate had jurisdiction, with having committed a theft in that county. The accused elected to be tried summarily. Evidence was taken after one or two adjournments, but the County Crown Attorney, having learned that the offences charged were committed, if at all, in a part of the county of Welland, in a locality where also the magistrate had jurisdiction, "asked" (I quote from Ecker's affidavit) "that the magistrate make no order," and "the magistrate made no order and has since refused to make an order in the matter," which he simply adjourned.

Informations had in the meantime been laid charging that the offences had been committed in the county of Welland.

To prevent the new charges from being heard, an application was made before Mr. Justice Rose, on behalf of each of the accused, "for an order prohibiting the said Police Magistrate from proceeding on further information in this matter against the defendant in the county of Welland, and for judgment that the plea of *autrefois acquit* is a good defence to the information laid against the defendant in the county of Welland."

Whether prohibition is the proper remedy in a case where, in a proper jurisdiction, a person has been in fact acquitted or convicted on the same charge, and an appeal lies, was not argued before this Court, and no opinion was or is expressed on that question.

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C.J.

Autrefois acquit, like *autrefois convict*, would be an absolutely effective plea in bar to the second information, if the accused had been either acquitted or convicted and it was attempted again to prosecute them for the same offence. The ancient law on the point, expressed in a trite maxim, has been firmly settled: Taylor on Evidence, 11th ed., p. 1162; Roscoe's Criminal Evidence, 15th ed., p. 260; and Archbold's Criminal Pleading, 25th ed., p. 155 *et seq.*

The learned Judge who heard the applications thought the interference of the Court was called for, because it was obvious that an attempt was being made "to put the men in jeopardy twice for the same offence."

This Court was of opinion that "in jeopardy twice"—the *bis vexari* of the legal maxim—has not the meaning of subjection twice to a trial for the same offence except in cases where the first trial has been concluded by an adjudication or judgment declaring the accused acquitted or convicted. Not otherwise could the plea of *autrefois acquit* or *autrefois convict* prevail.

As there was no conviction, no acquittal—merely an inconclusive adjournment—in these cases, the applications for prohibition were, for that reason, if for no other, improperly granted in the opinion of the Court, and the appeals were accordingly allowed.

Costs were not asked for by Mr. Bayly.

RIDDELL, J.A.:—This is an appeal from an order of prohibition made by Mr. Justice Rose.

The two defendants were charged, in informations dated the 24th October, 1928, with stealing chickens in the township of North Cayuga, in the county of Haldimand; they elected to be tried summarily; evidence was given, but no decision was announced, and the magistrate had not disposed of the case when the Crown counsel discovered that there was evidence against the accused of an offence in the township of Wainfleet, in the county of Welland. He asked the magistrate not to dispose of the case upon which evidence had been given, and the magistrate did not dispose of it. A new information was laid covering the Wainfleet offence, and the magistrate, having jurisdiction in Wainfleet, was proposing to try the newly laid charges, when he was stayed by

App. Div. Mr. Justice Rose's order of prohibition. It is now plain that the magistrate had power to try the former as well as the later charges.

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Riddell,
J.A.

Of course, the ground upon which the learned Judge proceeds is the well-recognised rule of our law, *Nemo debet bis vexari pro unâ et eâdem causâ*. We recently, in *Rex v. Isbell* (1928), ante 384, following the ruling cases in our own Courts, held that the only question in determining the right of a magistrate to proceed in a case before him was whether the accused was regularly before him on that charge; and neither the magistrate nor we had any concern with prior irregularities in respect of the accused. And, in the present case, the accused are regularly before the magistrate upon the later charges.

As to the objection based upon the maxim I have quoted, it is perfectly established that it is only when the prior proceeding has gone to judgment that the later proceeding is improper.

Broom's Legal Maxims, 8th ed., pp. 274, 275, correctly sets out the law thus: "Although our law forbids that a man should be again put in peril, after his conviction or acquittal upon a verdict given by a jury on a good indictment on which he could be legally convicted: yet an abortive trial without a verdict is no legal bar to a second trial either on the same or a fresh indictment; for instance, the jury, if unable to agree upon a verdict, may be discharged, and another jury be summoned. Moreover, the conviction or acquittal of a party is strictly, not by the verdict of the jury, but by the judgment of the Court thereon."

The case of *Winsor v. The Queen* (1866), L.R. 1 Q.B. 289, 390, and the judgment of Tindal, C.J., in *Burgess v. Boeteufeur* (1844), 7 M. & Gr. 481, at pp. 504, 505, are cited; and there can be no doubt as to the law.

I would allow the appeals.

Appeals allowed.

[APPELLATE DIVISION.]

1929.

April 5.

MCMILLAN v. WALLACE.

Negligence—Breach of Duty Imposed by Statute—Permitting Cattle to Stray upon Provincial Highway—Highway Improvement Act, sec. 73(3)—Damage to Motor-vehicle—Natural Result of Cattle being upon Highway—Finding of Jury—Law of Province—Conflict with English Law—Duty of Court—Judicature Act, sec. 31.

The plaintiff, lawfully travelling in his motor-car, at night, on a provincial highway, saw two calves on the road before him. He turned off to one side to avoid hitting them, when a third calf, which he

had not seen, came out of the ditch on the side to which he had turned, and, before he could stop, he had struck it, doing damage to his car. At the trial of an action to recover damages from the owner of the calves, it was established that they had been allowed to get on the road by the neglect of the defendant to keep up a proper fence. The jury found that the plaintiff was not guilty of negligence, but that the sole cause of the accident was the defendant's neglect to keep his calves off the road:—

Held, that, permitting one's cattle to run at large on a provincial highway being forbidden by the Highway Improvement Act, R.S.O. 1927, ch. 54, sec. 73(3), the presence of calves on the road was unlawful, quite as much so as if forbidden by a municipal by-law; and, where an animal is unlawfully upon a highway in this Province, the owner is liable in damages for any injury which is the natural result of the unlawful straying.

Patterson v. Fanning (1901), 2 O.L.R. 462 (C.A.), applied and followed. If this is opposed to the English law, it must still be followed: *Robins v. National Trust Co.*, [1927] 2 D.L.R. 97; Judicature Act, R.S.O. 1927, ch. 88, sec. 31.

And *held*, that the casualty was the natural result of the unlawful straying.

THE following statement is taken from the judgment of RIDDELL, J.A.:—

This is an appeal from the judgment after trial with a jury before the Judge of the County Court of the County of Peterborough of an action in that court. The facts are simple, and, while many points of great interest were raised and thoroughly discussed, I think that, in view of the decisions and of the relevant legislation, the matter lies in a very small compass.

The plaintiff was lawfully travelling in his motor-car, at night, on a provincial highway near Port Hope; seeing two calves on the road before him, he turned off to one side to avoid hitting them, when a third, a black calf, which he had not seen, came out of the ditch on the side to which he had turned, and, before he could stop, he had struck it, doing damage to his car, which the jury estimate at \$300. At the trial, it was established, beyond reasonable doubt, that the calves had been allowed to get on the road by the neglect of the defendant to keep up a proper fence; the jury found that the plaintiff was not guilty of negligence, but that the sole cause of the accident was the neglect of the defendant to keep his calves off the road; and the County Court Judge accordingly directed judgment to be entered for the plaintiff for the damages found. The defendant appealed.

February 4. The appeal was heard by LATCHFORD, C.J., RIDDELL, ORDE, and FISHER, JJ.A.

G. N. Gordon, K.C., for the appellant, argued that the findings of the jury were perverse and there was no reasonable evidence

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App. Div. to support them: *Jack v. Ontario Simcoe and Huron Railroad Union Co.* (1857), 14 U.C.R. 328. He also submitted that the defendant was under no duty to the plaintiff, as a member of the public using the road, to keep his cattle from straying upon it: *Heath's Garage Ltd. v. Hodges*, [1916] 2 K.B. 370. The accident was not the direct and natural consequence of any breach of duty which the defendant owed the plaintiff. The plaintiff's own negligence was the proximate cause of the accident, inasmuch as he saw, at a distance of 50 feet, the cattle upon the highway, and he failed to apply the brakes on his motor-car to prevent the accident: *Street v. Craig* (1920), 48 O.L.R. 324; *Ellis v. Banyard* (1911), 106 L.T.R. 51; *Dalgetty v. Hamilton Radial Electric Railway Co.* (1928), 62 O.L.R. 613. The defendant might be subject to a fine under the Act, but, as between him and the plaintiff, the latter was to blame.

J. A. O'Brian, for the plaintiff, respondent, contended that the jury's finding that the defendant was guilty of negligence was supportable on reasonable grounds. The cattle were unlawfully on the highway; and the plaintiff was using the highway lawfully. His lawful use was interfered with by the unlawful use which the defendant was making of it. The injury was the natural result of the defendant's allowing his cattle to stray on the highway: *Patterson v. Fanning* (1901), 2 O.L.R. 462; *Welch v. Dominion Transport Co.* (1922), 51 O.L.R. 549.

April 5. RIDDELL, J.A. (after stating the facts as above):—By the Highway Improvement Act, R.S.O. 1927, ch. 54, sec. 73(3), permitting one's cattle to run at large on a provincial highway is forbidden; consequently, the presence of these calves on the road was unlawful, quite as much so as if this had been forbidden by a municipal by-law; it would be absurd to say that a prohibition by the sovereign Legislature was less effective than a prohibition by an inferior body, deriving all its powers from the Legislature.

It is wholly unnecessary to discuss the interesting question whether, in this Province, it is by the basic law unlawful to permit cattle to run at large upon a public highway, belonging as it does to a municipality, as formerly to the Crown. The law is not necessarily the same as in England, as is manifest from such cases as *Scott v. Reikie* (1865), 15 U.C.C.P. 200; *Moore v. Bank of British North America* (1868), 15 Gr. 308; and the very interesting line of cases as to estate by estoppel, beginning with *Doe d. Hennesy v. Myers* (1831), 2 O.S. 424, through *Doe d. Tiffany v. McEwan* (1837), 5 O.S. 598, *Doe d. Irvine v. Webster* (1842), 2

U.C.R. 224, *Boulter v. Hamilton* (1864), 15 U.C.C.P. 125, *Edinburgh Life Assurance Co. v. Allen* (1876), 23 Gr. 230, at p. 235, and other cases down to *Trust and Loan Co. v. Ruttan* (1877), 1 Can. S.C.R. 564, at p. 584, and *Casselman v. Casselman* (1885), 9 O.R. 442. If and when it becomes necessary to determine whether it is in this Province to be taken that to allow animals to run at large upon the highway is "contrary to the common law," as is taken for granted in *Jack v. Ontario Simcoe and Huron Railroad Union Co.*, 14 U.C.R. 328, the matter will be of course considered fully.

But it was decided by the Court of Appeal in *Patterson v. Fanning*, 2 O.L.R. 462, that to allow an animal to run at large against the prohibition of a municipal by-law was unlawful; and we must take that as being the law for our present purpose. So far, we are not met with *Trimble v. Hill* (1879), 5 App. Cas. 342, which applies strictly to the interpretation of a statute; and, no matter what the law may be in England, there is no statute here to be interpreted.

The same case (*Patterson v. Fanning*) decides that where an animal is unlawfully upon a highway in this Province, the owner is liable in damages for any injury which is the natural result of this unlawful straying.

This, it was strongly argued, is opposed to such cases as *Heath's Garage Ltd. v. Hodges*, [1916] 2 K.B. 370, *Turner v. Coates*, [1917] 1 K.B. 670, 674, *Hadwell v. Righton*, [1907] 2 K.B. 345, etc. I do not go into these cases at length for two reasons:—

(1) The Judicial Committee have recently said in *Robins v. National Trust Co.*, [1927] 2 D.L.R. 97, that when an "Appellate Court in a Colony which is regulated by English law differs from an Appellate Court in England, it is not right to assume that the Colonial Court is wrong." This is substantially what our own Court says in *Macdonald v. McDonald* (1886), 11 O.R. 187—and see *McDonald v. Elliott* (1886), 12 O.R. 98. (We are, of course, a "Colonial Court" within the meaning of this decision: *Boys v. Star Printing and Publishing Co.* (1927), 60 O.L.R. 592, at pp. 600, 601.)

(2) There is another cogent reason why our own Court should be followed, viz., the statutory provision, now found in the Judicature Act, R.S.O. 1927, ch. 88, sec. 31, directing us to follow our own Courts unless their decision is "overruled or otherwise impugned by a higher court." The power of the Legislature to pass such legislation is unquestionable: *Florence Mining Co. Ltd. v.*

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Riddell,

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App. Div. *Cobalt Lake Mining Co. Ltd.* (1909), 18 O.L.R. 275, at p. 279,
 1929. affirmed in the Privy Council (1910), 43 O.L.R. 474.

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WALLACE.~~ We must, then, follow the decision in *Patterson v. Fanning*, whatever the English Courts (short of the House of Lords at least) may hold.

Riddell, J.A. The sole question, then, open to us is, whether the casualty was the natural cause of the unlawful straying, and as to that I can have no doubt. Whatever may be the natural thing for English horses or sheep or hens, as to which I must plead ignorance, it is the natural thing for Ontario calves to dodge across a road, appearing in unexpected as well as expected places; and it is the natural result of allowing them to run loose on the road that they will get in the way of travel. I consider this casualty the natural result of a "tort committed in breach of a statutory prohibition"—to use the language of the Privy Council in a very different case, *Toronto Railway Co. v. City of Toronto*, [1920] A.C. 455.

The jury has rightly found that the plaintiff was not guilty of negligence and that the whole cause of the accident was the negligence and disobedience of a statutory duty by the defendant.

I would dismiss the appeal.

LATCHFORD, C.J., agreed in the result.

ORDE and FISHER, JJ.A., agreed that the appeal should be dismissed.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

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April 5.

KOSOBUSKI v. EXTENSION MINING CO. LTD.

Mechanics' Liens—Claims of Liens by Wage-earners—No Sum Due from Owners to Contractor — Option for Purchase of Mining Property—Consideration—Extinction of Option by Default—Work Done by Lienors for Optionee—Mechanics' Lien Act, R.S.O. 1927, ch. 173, secs. 1(c) and (f), 10, 11.

The owners of a mining property, by an agreement in writing, granted to W. the exclusive right to purchase it for \$35,000, payable in instalments. As part of the consideration for the option W. agreed to de-water the mine and keep it unwatered during the continuance of the option and to do other things. The agreement fixed no period for notice of the exercise of the option—its exercise was dependent upon payment of all the instalments as they fell due. Default was made in payment of the second instalment; and the option was thereafter

treated as having expired by reason of such default. The plaintiffs were employed by the E. corporation in de-watering the mine, W. having assigned the option to that company, and the plaintiffs claimed liens upon the property under the Mechanics' Lien Act, for their unpaid wages. There was no contractual relationship between the owners and the plaintiffs:—

Held, that no title to or interest in the land passed to W. or to any assignee of his; the consideration passing to W. for the work was complete, and nothing further could at any time thereafter become payable by the owners to him in respect thereof.

W. was a contractor for the de-watering; and, as no amount was ever or could be owing to him by the owners under his contract, there was nothing upon which any lien for work done for him could attach. Section 1(c) and (f) and secs. 10 and 11 of the Act and *S. Morgan Smith Co. v. Sissiboo Pulp and Paper Co.* (1904), 35 Can. S.C.R. 93, referred to.

Agency of W. and those acting under him for the owners was not established.

AN appeal by the defendants the Ixion Mines Ltd. from the judgment of the Judge of the District Court of the District of Temiskaming finding that the plaintiffs had established their claims to liens upon certain mining lands, in a proceeding under the Mechanics' Lien Act, R.S.O. 1927, ch. 173.

The appellants were the owners of the mining lands, and the plaintiffs claimed liens upon the estate of the appellants therein for amounts alleged to be due to them by the other defendants, the Extension Mining Company Ltd. and the Extension Mines Corporation Ltd.

By an agreement in writing, dated the 1st April, 1925, the appellants granted to one Ward the exclusive right to purchase the property known as the Cochrane Mine, and, as part of the consideration for the option, Ward agreed to de-water the mine and keep it unwatered during the continuance of the option and to do many other things.

The plaintiffs were employed by the defendants the Extension Mines Corporation Ltd. in pumping out or de-watering the mine, and their claims were for wages for the services so performed. They had no contract with the appellants. It was said that Ward had assigned the option to the Extension Mines Corporation Ltd.

January 9 and February 20. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

G. W. Mason, K.C., and *G. S. O'Brian*, for the appellants, argued that, the plaintiffs never having been employees of the appellants, no lien could attach to the interest of the appellants in the lands in question: *Marshall Brick Co. v. Irving* (1916), 35

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App. Div. O.L.R. 542; *Webb v. Gage* (1902), 1 O.W.R. 327. The option granted to Ward was not assignable: *Gold v. Stover* (1920), 60 Can. S.C.R. 623, 631; *Canadian Pacific Railway Co. v. Rosin* (1911), 2 O.W.N. 610, 18 O.W.R. 387, 391. There was no contractual relationship between the plaintiffs and the appellants, and so no lien could attach against the interest of the appellants as "owners." Section 10 of the Mechanics' Lien Act also prevented any lien from attaching, because there was no money owing by the defendants to Ward.

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H. H. Davis, K.C., for the plaintiffs, respondents, contended that the *Marshall* case did not apply, because in that case there was an agreement for sale, whereas here there was none. The appellants were and remained the "owners" all the time. Ward and those acting under him were really agents for the appellants, the "owners," in carrying on the work of de-watering the mine, and, as this work was thus done for the appellants in fact, their interest in the lands was subject to the plaintiffs' liens: 40 *Corpus Juris*, pp. 113, 114.

Mason, K.C., in reply, referred to *Gearing v. Robinson* (1900), 27 A.R. 364.

April 5. ORDE, J.A.:—The appellants, the Ixion Mines Limited, are the owners of the mining lands in question, and the plaintiffs, under the Mechanics' Lien Act, R.S.O. 1927, ch. 173, claim to be entitled to liens upon the estate of the appellants therein for the amounts claimed to be due them respectively by the defendants Extension Mining Company Limited and Extension Mines Corporation Limited.

The learned District Court Judge has declared the plaintiffs so entitled, and from that judgment the defendants the Ixion Mines Limited now appeal.

When the appeal was opened, the argument was confined to a discussion of the effect, upon the relationship and rights of the respective parties, of the giving of an option granted by the appellants to one Ward to purchase the lands in question and of the alleged assignment thereof by him, either directly or through one or more mesne assignments, to the Extension Mines Corporation Limited, by whom the plaintiffs were employed. The question of the bearing of sec. 10 of the Mechanics' Lien Act upon the rights of the plaintiffs was not then raised, and at the request of the Court counsel were later heard upon this point.

The situation is really a very simple one. By an agreement in writing dated the 1st April, 1925, the appellants granted to

Ward the exclusive right to purchase the property known as the Cochrane Mine for the sum of \$35,000, payable \$5,000 on the 1st April, 1926, \$15,000 on the 1st April, 1927, and \$15,000 on the 1st April, 1928. As part of the consideration for the option, Ward agreed to de-water the mine and keep it unwatered during the continuance of the option, and to do many other things, in the way of exploration and development, to pay the premiums upon the appellants' fire insurance policies and the municipal and provincial taxes upon the property, and he was at liberty to keep five-sixth of all sums realised from the sales of ore (the other one-sixth to be paid to the appellants, to be applied in reduction of the purchase-price if the option should be exercised), and under certain conditions to remove any plant which he might have brought upon the property.

The option fixes no period for notice as to its exercise, and it would appear from its whole tenor that its exercise was dependent upon payment as they fell due of all three instalments of the purchase-price.

The first instalment of \$5,000 due on the 1st April, 1926, was duly paid, but that of \$15,000 due on the 1st April, 1927, was not; and, according to the evidence, the option was thereafter treated as having expired by reason of such default. It seems to be quite clear, from the terms of the option, that payment of the full purchase-price was a condition precedent to the exercise of any right of purchase given Ward by the agreement, and that the payment of any of the earlier instalments did not constitute a binding agreement on either side as to the balance of the purchase-price, the payment of any further instalment being still optional on Ward's part. In these circumstances, no title or interest in the lands ever passed to Ward or to any assignee of his; and cases like *Marshall Brick Co. v. Irving*, 35 O.L.R. 542, and *sub nom. John A. Marshall Brick Co. v. York Farmers Colonization Co.* (1917), 54 Can. S.C.R. 569, which were cited on the argument, have no application to the present case.

The plaintiffs were employed by the Extension Mines Corporation Limited in pumping out or "de-watering" the mine, and their claims are for wages for the services so performed. There was no contractual relationship whatever between the Ixion Mines Ltd. and the plaintiffs, and it is impossible, in my judgment, having regard to the relationship of the parties and the provisions of the Mechanics' Lien Act, for any lien to have attached against the estate of the owners for the wages claimed by the plaintiffs.

The work of de-watering the mine was to be performed by

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App. Div. Ward as part of the consideration for the option granted to him
1929. by the appellants. The consideration passing to him for that work was complete, and nothing further could at any time thereafter become payable by them to him in respect thereof.

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Section 10 of the Mechanics' Lien Act is as follows:—

"Save as herein otherwise provided where the lien is claimed by any person other than the contractor the amount which may be claimed in respect thereof shall be limited to the amount owing to the contractor or subcontractor or other person for whom the work or service has been done or the materials placed or furnished."

Ward was clearly a contractor for the de-watering of the mine; and, as no amount was ever or could be owing to him by the appellants thereunder, there was nothing upon which any lien for work done for him could attach. Nothing in the Act gives a subcontractor (which term by para. (f) of sec. 1 includes a wage-earner) the right to recover, as against any person higher up the scale than the person with whom he himself contracted, more than the amount owing to such person by those above him, due regard being had, of course, to the obligation of the owner and each contractor and subcontractor to protect possible lienholders under sec. 11, by retaining, out of the contract price, the percentages specified in subsecs. 1 and 2, or a larger amount if notice in writing is given under subsec. 4.

The case of *S. Morgan Smith Co. v. Sissiboo Pulp and Paper Co.* (1904), 35 Can. S.C.R. 93, is very like the present one. There the plaintiffs had supplied certain machinery to a contractor who under a complicated contract had agreed to erect a mill for the defendant company. The consideration for the contract had wholly passed before the machinery was supplied. The provisions of the Nova Scotia Mechanics' Lien Act (R.S.N.S. 1900, ch. 171) were almost identical with ours. At p. 97, the judgment proceeds:—

"The plaintiffs acquired no lien by their contract with Burrill. No lien could attach until the machinery was actually furnished or the work done. Long before that the full consideration had been paid. The only ground upon which the plaintiffs can hope to maintain a lien as against the defendant company would be that section 8 of the Act applies, and we think that that section does not by its terms apply to a case where there was no price specified or capable of being ascertained for the erection of the building, but the contract price of the building was blended with considerations for other matters from which it could not be separated."

I am not overlooking the concluding words of subsec. 1 of sec. 11 of the Ontario Act, which were not in the Nova Scotia Act of 1900, namely: "or if there is no specific contract price, then on the basis of the actual value of the work, service or materials." Just how far this addition to the previous provisions of the section may extend, it is not necessary now to decide, but it seems clear that the whole section contemplates an obligation to pay either presently or at some future date something in money or money's worth from which the drawback may be "retained" by "the person primarily liable." If the contract is such that no liability to pay anything was ever incurred by the owner of the lands, there would seem to be nothing to which the lien of any subcontractor could attach.

The suggestion made by counsel for the plaintiffs that Ward and those acting under him were really agents of the owners in carrying on the work of de-watering hardly requires an answer. Ward was to do the work at his own expense and there could not possibly have been any contractual liability on the part of the owners to his employees.

The appeal must be allowed and the action dismissed as against the appellants with costs.

LATCHFORD, C.J.:—The opinion which I expressed upon the first argument of this appeal has not been changed. I still think the appeal should be allowed.

The learned District Court Judge seems to me to have acted under a total misapprehension of the scope of the Mechanics' Lien Act. There was not only no contractual relation or *nexus* between Kosubuski and his fellow-workmen on the one part, and Ixion Mines Ltd. on the other, but nothing was ever due by that company to the employers of the workmen. There was never any liability of the owners of the mine to the Extension Mining Company except to convey the property, if so requested, after the Extension Mining Company had discharged its obligations under the option. The appellants were not "owners" as defined by sec. 1 (c) of the Mechanics' Lien Act, and the "work or service" was not "done . . . at the request" of the appellants, nor for their "direct benefit."

For these and other reasons that might be mentioned, no lien could attach, in the circumstances, on the appellants' property.

The appeal should be allowed with costs and the action dismissed with costs, and the registration of the liens vacated.

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App. Div. RIDDELL, J.A.:—I agree that, in the circumstances of this case, neither agency for the owners nor liability of the owners to pay any money to the employers of the lienors was established—and, consequently, there is no lien upon the property: *Freedman v. Guaranty Trust Co.* in this Court (1929), 36 O.W.N. 223. I agree that the appeal should be allowed and the action dismissed with costs.

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MASTEN and FISHER, JJ.A., concurred.

Appeal allowed.

[APPELLATE DIVISION.]

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RE BAYACK.

April 5.

Assessment and Taxes—Correction of Assessment Roll—Change in Occupation of Premises before Return of Roll—“Error or Omission”—Appeal to Court of Revision—Power to Correct—Assessment Act, secs. 54, 72.

B. was a tenant of property in a city when an assessor was making his rounds, and she was correctly entered on his roll as a separate school supporter. Some time later, before the roll was finally revised, B. vacated the premises, and they were occupied by another resident of the city, who was a public school supporter:—

Held, that, although the entry of B.'s name on the roll was not an error at the time it was made, it became an error before the roll was finally returned, and the absence from the roll of the name of the new tenant became an omission; and the error as to one tenant and the omission as to the other were, upon a proper appeal, open to correction by the Court of Revision or by the County Court Judge upon appeal from the Court of Revision: secs. 54 and 72 of the Assessment Act, R.S.O. 1927, ch. 238.

AN appeal by Marie F. Bayack, upon a case stated, from an order of the Senior Judge of the County Court of the County of York, upon appeal from a decision of the Court of Revision for the City of Toronto, allowing the appeal and holding that alterations in the assessment roll should have been made by the Court of Revision, in accordance with the true meaning of the Assessment Act.

February 20. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

J. E. Day, K.C., for the appellant, submitted that sec. 54 of the Separate Schools Act, R.S.O. 1927, ch. 328, had nothing to

do with the question before the Court for decision, which was whether the Court of Revision had jurisdiction to amend the assessment roll at the instance of a public school supporter after the roll had been returned by the assessor, but before the roll was finally revised. The Court of Revision had no such jurisdiction. The appeal to that body was too late. The assessment was made when the assessor put it in his book. An "error" of his could be rectified up to the time he returned the roll, but something which happened after he made his assessment, but before he returned the roll to the clerk, could not be put in. Reference to *Re Palmer and City of Toronto* (1924), 26 O.W.N. 84; *Noble v. Township of Esquesing* (1920), 47 O.L.R. 255.

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E. P. Brown, K.C., for the Toronto Public School Board, respondent, contended that the assessment was not completed until the final return of the assessor to the clerk, verified by the assessor's affidavit. Up to that time any "error" or "omission" of fact as of the time of such return could be rectified.

F. A. A. Campbell, for the Corporation of the City of Toronto, respondent, adopted the argument that the roll could be amended up to the time of its final return by the assessor to the clerk. Reference to *In re Allan* (1885), 10 O.R. 110; *Re City of Regina Assessment* (1909), 11 W.L.R. 441; *Principal Secretary of State for War v. City of Toronto* (1863), 22 U.C.R. 551; Manning on Assessment and Rating, p. 140.

Day, K.C., in reply, urged that there was a difference between "assessment" and "assessment roll." Completion of one was a different thing from completion of the other.

April 5. *LATCHFORD, C.J.*—This appeal is on a stated case, submitted pursuant to sec. 84 (3) of the Assessment Act, R.S.O. 1927, ch. 238, by his Honour Emerson Coatsworth, Esquire, Judge of the County Court of the County of York, sitting pursuant to sec. 60 (3) of the Act, on an appeal from the Court of Revision for the City of Toronto.

The facts are not in dispute. The appellant was a tenant of property in Toronto when an assessor was making his rounds, and she was correctly entered on his roll as a separate school supporter. Some time later, before the roll was finally revised, she vacated the premises, and they were occupied by another resident of the city who was not a supporter of such schools. By all parties concerned it is admitted that there were many similar cases.

After the roll had been returned by the assessor (who could previously have corrected errors or omissions—sec. 54), "appeals

App. Div. were made to the Court of Revision . . . to substitute (for
1929. the old) these new tenants who were in all cases public school
supporters. The clerk of the municipality gave notice of the appeal
RE
BAYACK. in each case to the persons appealed against, pursuant to sec. 72
of the Assessment Act . . . The alteration asked for was re-
Latchford,
C.J. fused."

No reasons for the dismissal of the appeals are before this Court.

Further appeals were then taken to the County Court Judge, who was of opinion "that such alterations may be made," and accordingly allowed the appeals, considering, he says, that they "were governed by sec. 54, subsec. 3, of the Separate Schools Act," R.S.O. 1927, ch. 328.

I may observe incidentally that no provision of sec. 54 or any other provision of the Separate Schools Act has any bearing whatever on the issue involved here.

On the application of the appellant, his Honour stated the following case:—

"Upon the facts above and upon the true construction of the Assessment Act and the sections of the Separate Schools Act made applicable by the Assessment Act as applied to the facts so stated, was I right in holding that the alterations were properly made within the meaning of the Assessment Act?"

This submission is not easily understood. No alterations whatever were made either by the assessor or the Court of Revision. What his Honour is doubtless referring to is what would follow from the result of the appeal to himself, and the submission intended is, I think, this: Was I right in holding that the alterations desired by the appeals to the Court of Revision should have been made?

The power of the Court of Revision to correct errors or omissions in the roll is not open to doubt. The formation of the roll is by successive stages. There is, first, the entry by the assessor, who may, under sec. 54, correct errors or omissions. After he has returned his roll, errors or omissions may be corrected by the Court of Revision and on further appeal by the County Court Judge.

It is only when the County Court Judge has finally certified the roll that it is to form the basis of taxation.

It is quite true, as contended by Mr. Day, that the entry of Mrs. Bayack's name on the roll was not an error at the time it was made. It, however, became an error before the roll was finally returned, and the absence from the roll of the new tenant became an omission. Upon an appeal properly made—and there is no

suggestion that the appeals in this and similar cases were not properly made pursuant to sec. 72—the error as to one tenant and the omission as to the other were open to correction as they were corrected by the County Court Judge on the appeal from the Court of Revision.

The question submitted, therefore, in the form intended, must be answered in the affirmative. The appeal is therefore dismissed with costs.

RIDDELL, J.A.:—This is a case stated by his Honour Judge Coatsworth, at the instance of Marie F. Bayack, one of a class named in the case stated; and the case comes to us under the provisions of sec. 84 of the Assessment Act, R.S.O. 1927, ch. 238.

So far as of any importance, the case reads:—

“I find that in each of the above appeals the assessor entered a Roman Catholic school supporter on the roll, and such persons were so assessed on the return of the roll. Other tenants, residents of the city of Toronto, moved into the premises after the assessor had made his entry and before the return of the roll, and appeals were made to the Court of Revision after the return of the roll to substitute these new tenants, who were in all cases public school supporters. The clerk of the municipality gave notice of appeal in each case to the persons appealed against, pursuant to sec. 72 of the Assessment Act, by enclosing notice of the appeal in a letter post-prepaid addressed to such persons at the places where they formerly resided. On the hearing of the appeals the alteration asked for was refused by the Court of Revision of the City of Toronto.

“On the footing of that finding, my opinion is that such alterations may be made, and accordingly I granted the redress asked for, considering that these appeals were governed by sec. 54, subsec. 3, of the Separate Schools Act, being R.S.O. 1927, ch. 328.

“I, therefore, allowed the appeals.

“Upon the facts above and upon the true construction of the Assessment Act and the sections of the Separate Schools Act made applicable by the Assessment Act, as applied to the facts so stated, was I right in holding that the alterations were properly made within the meaning of the Assessment Act?”

A number of points were raised during the argument, but most of them were got rid of; we do not take into consideration the religion of the tenants—that is *nihil ad rem*. The simple question to be decided is whether the decision of the learned County Court Judge was right—this, of course, requires us to consider

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App. Div. the right to appeal to the Court of Revision, it being admitted
1929. that if the right of appeal to the Court of Revision existed, there
was no doubt of the right to appeal to the County Court Judge.

RE BAYACK. This will depend upon the interpretation to be placed upon
sec. 72 of the Act, ch. 238, which reads:—

Riddell,
J.A. “Any person complaining of an error or omission in regard to himself, as having been wrongly inserted in or omitted from the roll, or as having been undercharged or overcharged by the assessor in the roll, may personally, or by his agent, give notice in writing to the clerk of the municipality (or to the assessment commissioner, if any), that he considers himself aggrieved for any or all of the causes aforesaid, and shall give a name and address where notices can be served by the clerk as hereinafter provided.”

In reality, the question is as to the meaning of the words “error or omission.” Do they mean a subjective error or omission in the assessor, or an actual error in the roll?

Much was said during the argument as to the meaning of the word “assessment,” but I think little, if any, advantage is to be derived from such a discussion, the word “assessment” as a noun not being used in this section at all. The errors or omissions aimed at are errors or omissions in the roll, and nothing else.

It may be of advantage to consider the scheme of the Assessment Act—we begin with sec. 40: “Land shall be assessed at its actual value;” by sec. 24 (1) (b), on his roll “he shall set down in the proper column opposite his name the amounts assessable against each person.” This is often called an “assessment,” but it is really a tentative valuation by the assessor of the property to be assessed; it by no means completes the roll, for, “before completing the roll,” the assessor sends the “person named in the roll,” a notice in form 5 set out in the schedule to the statute, p. 3100. This notice, indeed, does speak of the person being “assessed,” but that, I think, is immaterial, for in any case the roll is not complete. The roll continues in the control of the assessor; he may, “at any time before the time fixed for the return of the assessment roll, correct any error in any assessment and alter the roll accordingly; and he shall do so upon notice being given to him of any error.” In view of the provisions of the Act as to return, etc., I cannot think that this means “any error” which he may have made in the first instance; but it means, I think, any existing error in the roll—the expression is objective not subjective—it has no relation to the assessor, whose personality and identity and accuracy, except in respect of the assessment roll, are of no importance in this connection; the reference is wholly

with regard to the state of the roll, in which the person is deeply interested. The assessor is required to "complete his roll" by a certain time: sec. 53. Now, so far as the assessor is concerned, the roll being returned is complete. This is not final: as soon as the clerk of the municipality has the roll as returned, he may go over it and see if there are any errors or omissions (sec. 56), or any one complaining may bring his complaint before the Court of Revision, under sec. 72 (1). I can find no reason to hold that the errors and omissions there referred to are the original errors or omissions of the assessor or anything for which he was responsible; there does not seem to be any reason to think that any error or omission, by the fault of any one or of no one, is not to be made right.

It is not necessary in this case, to go any further than this Court did in *Re Palmer and City of Toronto*, 26 O.W.N. 84—we do not decide whether errors appearing for the first time after the return of the roll may thus be corrected.

I would answer the question in the sense of the above opinion, and with costs.

MASTEN, J.A.:—Appeal on a case stated by his Honour Judge Coatsworth, Judge of the County Court of the County of York, dated the 17th December, 1928. The case as stated by the learned Judge below is set forth in the reasons for judgment which have been prepared by my brother Riddell, and need not here be repeated.

I have been unable to understand what bearing, if any, sec. 54, subsec. 3, of the Separate Schools Act has on the question here raised. That subsection extends the time within which a separate school supporter can, in the circumstances there mentioned, give a notice pursuant to subsec. 1 of sec. 54 of the Separate Schools Act. Here the question is whether the Court of Revision had jurisdiction at the instance of a public school supporter to amend the assessment roll by substituting for a separate school supporter "other tenants, residents of Toronto, who moved into the premises in question after the assessor had made his original entry and before the return of the roll."

In my opinion, the question before the Court falls to be dealt with, not under the provisions of the Separate Schools Act, but under the provisions of the Assessment Act. When the various the problem presented on this appeal seems to me to present but little difficulty. Accordingly I propose to refer to the provisions of that Act.

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Section 1, para. (i), provides as follows:—

“Last revised assessment roll” shall mean the last revised assessment roll of a municipality; and an assessment roll shall be deemed to be finally revised and corrected when it has been so revised and corrected by the court of revision, or by a judge of the county court on appeal as by this Act provided, or when the time within which appeal may be made has elapsed.”

Under subsec. 1 of sec. 24, every assessor shall prepare an assessment roll in which after diligent inquiry he shall set down, according to the best information to be had, (a) the name of the person liable to assessment on the parcels in question.

Section 37, in subsecs. 3 and 4, provides as follows:—

“(3) Land owned by a resident in the municipality and occupied by any person other than the owner shall be assessed against the owner and the tenant.

“(4) Occupied land owned by a person who is not a resident in the municipality shall be assessed against the owner if known, and against the tenant.”

Subsection 1 of sec. 53 reads as follows:—

“(1) Subject to the provisions of sections 59 to 63, every assessor shall begin to make his roll in each year not later than the 15th day of February, and shall complete the same on or before the 30th day of April, and, in municipalities not having an assessment commissioner, the assessor shall attach thereto his affidavit or solemn affirmation, and, in municipalities having an assessment commissioner, the assessment commissioner, or his assistant, as the case may require, shall attach thereto his affidavit or solemn affirmation.”

The affidavit referred to verifies the correctness of the roll.
(See form 6 in the schedule to the Act.)

Subsection 3 of sec. 53 provides for the delivery of the roll, when verified and completed, to the clerk of the municipality. Section 54 reads as follows:—

“54. Notwithstanding the delivery or transmission of any notice provided for by sec. 52, the assessor, at any time before the time fixed for the return of the assessment roll, may correct any error in any assessment and alter the roll accordingly; and he shall do so upon notice being given to him of any error; and, upon so correcting or altering any assessment he shall deliver or transmit to the person assessed an amended notice.”

These provisions make it plain to my mind that down to the time when the roll is delivered by the assessor to the clerk there is no completed assessment. Up to that moment the assessor is

engaged in making his roll. Prior to its delivery to the clerk he has power to make alterations in his tentative assessment, and in the entries which he has made in his roll. If he becomes aware of any error, it is his duty to correct it, and this power and duty continue down to the time when the completed roll, verified by the assessor's affidavit, is delivered to the clerk. When he has delivered the verified roll to the clerk, the function and powers of the assessor cease. Then and then only is there a completed assessment.

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By the affidavit of the assessor (form 6) the assessor swears:—

"I have justly and truly assessed each of the parcels of real property so set down at its actual value and according to the best of my information and belief I have entered the names of all owners and tenants assessable in respect of each such parcel."

In para. 3 of his affidavit he swears:—

"I have not intentionally omitted from said roll the name of any person whom I knew or had good reason to believe to be entitled to be entered therein under any or either of the said Acts."

From these various provisions I conclude, not only that there is no assessment until delivery of the roll to the clerk, but that the roll is intended to be a true statement of the situation and facts as they existed at the moment when the assessor's affidavit was sworn.

Sections 56 and 58 (2) of the Act are as follows:—

"56. It shall be the duty of the clerk to report to the court of revision the facts and particulars as to any errors or omissions in the assessment roll of which he may from time to time become aware; and the court of revision shall thereupon take such steps as the court shall deem advisable and necessary to cause such corrections to be made in the roll, and shall give such notice to persons interested as such corrections may render necessary."

"58.—(2) Any person entitled to be assessed or to have his name inserted or entered in the assessment roll of a municipality, shall be so assessed, or shall have his name so inserted or entered, without any request in that behalf; and a person entitled to have his name so inserted or entered in the assessment roll, or in the list of voters based thereon, or to be a voter in the municipality, shall, in order to have the name of any other person entered or inserted in the assessment roll or list of voters, as the case may be, have for all purposes the same right to apply, complain or appeal to a court or a judge in that behalf as such other person would or can have personally, unless such other person actually dissents therefrom."

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If, as I think, the statute requires that the assessment as recorded in the roll when it is returned to the clerk shall contain a correct statement of the situation and facts as they exist at the time of such return, then the omission from the roll of the names of the "other tenants, residents of the City of Toronto, who moved into the premises after the assessor had made his entry, and before the return of the roll," was an error or omission which fell to be corrected by the Court of Revision.

Sections 69 and 72 (3) read as follows:—

"69. At the time or times appointed, the court shall meet and try all complaints in regard to persons wrongly placed upon or omitted from the roll, or assessed at too high or too low a sum."

"72.—(3) If a person assessed thinks that any person has been assessed too low or too high, or has been wrongly inserted in or omitted from the roll, he may, within the time limited by the preceding subsection, give notice in writing to the clerk of the municipality or to the assessment commissioner, if any, and the clerk shall give notice to such person and to the assessor, of the time when the matter will be tried by the court of revision; and the matter shall be decided in the same manner as complaints by a person assessed with regard to his own assessment."

By sec. 72, subsec. 17, it is provided that:—

"In other cases, the court, after hearing the complainant, and the assessor, or assessors, and any evidence adduced, and, if deemed desirable, the person complained against, shall determine the matter, and confirm or amend the roll accordingly."

Section 75, subsec. 1, provides that "an appeal to the county judge shall lie, at the instance of . . . any person assessed . . . against a decision of the Court of Revision."

These provisions of the Assessment Act which I have last quoted require no comment. I would summarise the effect of these several provisions above quoted as follows:—

(1) There is no separate assessment of each individual property as the roll is being made up by the assessor.

(2) The assessment takes place for the first time when the completed roll is delivered by the assessor to the clerk.

(3) The intention of the statute is that the roll so delivered shall conform to the situation and facts as they exist at the time of delivery of the roll to the clerk.

(4) Any discrepancy between the statement in the roll and the actual facts constitutes an error or omission in the assessment.

(5) It is the duty of the Court of Revision to correct such error or omission if properly brought to its attention.

(6) An appeal lies from the Court of Revision to the County Court Judge for the correction of such error.

The result is that the appeal should be dismissed with costs.

ORDE, J.A., agreed with the Chief Justice.

FISHER, J.A., agreed with RIDDELL and MASTEN, JJ.A.

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Appeal dismissed.

[APPELLATE DIVISION.]

FOLEY v. SANGSTER.

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Appl 5.

Division Courts—Jury Trial—Procedure—Failure of Clerk to Summon Jury in Accordance with Directions of Division Courts Act, R.S.O. 1927, ch. 95, secs. 124 et seq.—Jury Called by Judge from Body of Court—Sec. 34(2)—Verdict of Jury Set aside—New Trial.

The plaintiff in an action in a Division Court required a jury, pursuant to sec. 124 of the Division Courts Act. The clerk of the court summoned a jury, but not in the manner prescribed by secs. 125 et seq. of the Act. The defendant objected; and the Judge disposed of the difficulty by calling a jury from the body of the court. The action was tried by the jury thus formed, and judgment was entered for the plaintiff upon the jury's verdict:—

Held, upon an appeal by the defendant, that the Judge had no power to deprive either party of the right to have a trial by a jury qualified and summoned according to the strict requirements of the Act.

The provisions of sec. 134(2) are not applicable in the circumstances stated—they apply only to a case where the Judge, of his own motion, calls a jury.

AN appeal by the defendant from the judgment of the First Division Court of the County of Huron in an action, tried with a jury, brought upon a promissory note given for seed sold to the defendant. On the verdict of the jury, judgment was given in favour of the plaintiff for the recovery of \$298 with interest and costs. There was a counterclaim for damages for misrepresentation of the seed sold. The jurors were chosen from the persons who were in the court-room, not from persons previously summoned.

March 4. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

F. C. S. Evans, for the appellant, argued that the trial Judge erred in allowing the jury to be chosen from a list of men who

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1929. 125, 126, 127, and 129 of the Division Courts Act, R.S.O. 1927,
ch. 95. There should be a new trial.

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SANGSTER. *L. E. Dancey*, for the plaintiff, respondent, contended that the trial Judge had power, under sec. 134, subsec. 2,* to summon a jury as he had done.

April 5. **LATCHFORD, C.J.**—The plaintiff did “require a jury,” pursuant to sec. 124 of the Division Courts Act, R.S.O. 1927, ch. 95, and gave due notice thereof to the clerk, as prescribed by sec. 125, and deposited with the clerk, as prescribed by sec. 125, and deposited with the clerk the proper fees for the expenses attending the summoning of the jury.

In such a case, the clerk, under sec. 129, “shall cause” to be summoned not less than twelve of the persons liable to serve as jurors who have the special qualifications of residence within the division and inscription as jurors on the voters’ list of a municipality partly or wholly within the division. They are selected by the clerk in a definitely prescribed manner: secs. 126 and 127.

The clerk did not select and summon a jury in the manner prescribed.

At the inception of the trial, counsel for the defendant objected to proceeding; but, counsel, for the plaintiff insisting, the learned trial Judge, relying on sec. 134, subsec. 2, overruled the objection, and ordered the clerk to call five men from the body of the court. Such a jury was then called and sworn, and the trial proceeded, resulting in a verdict for the plaintiff.

I am clearly of opinion that in the circumstances it was not proper for his Honour to have exercised the power conferred upon him by subsec. 2 of sec. 124. The defendant had an undoubted right to a jury selected and summoned from the list of specially qualified persons, prescribed by secs. 126 and 127. Where notice requiring a jury has been given, as it was in this case, and the subsequent provisions of the statute have not been complied with, the trial Judge has in my opinion no power to invoke the provisions of sec. 134, as, *suâ sponte*, he might in other circumstances.

* 134.—(1) If the panel is exhausted, the judge may direct the clerk to summon, from the body of the court, a sufficient number of disinterested persons to make up a full jury, and any person so summoned may, saving all lawful exceptions and rights of challenge, act as a juror.

(2) Where the judge thinks it proper to have the action or any controverted fact tried by a jury, the clerk shall instantly return a jury of five disinterested persons present, to try the same, and the judge may give judgment on the verdict of the jury.

The appeal should be allowed with costs and the judgment below vacated with costs.

RIDDELL, J.A.:—This is a case in the First Division Court of the County of Huron, the action being for the amount of a promissory note, and there being a counterclaim for damages for misrepresentation of the seed for the price of which the note was given.

Pursuant to secs. 124, 125, the plaintiff gave notice for trial by a jury. Upon this being done, “a jury shall be summoned.” sec. 125; and in a particular way: sec. 127 (2) (a); the clerk disobeyed the express terms of the Act, and, when the case came on for trial, the defendant objected to the jury so formed by the clerk. This Court has decided that a party to an action is entitled to a trial by a jury properly called; and, if he is compelled to submit to trial by a jury not properly called or abandon his action, he is entitled to a new trial: *McEwen v. Little* (1925), 28 O.W.N. 7.

Instead of the Judge postponing the trial until a proper jury had been summoned, he, on the objection being taken, said, “No, gentlemen, I am going to call a jury from the body of the court,” and, against the protest of the defendant, he directed the clerk to call five men from the body of the court. This was clearly wrong, the section under which we are informed that the Judge purported to act, sec. 134 (2), having reference to an entirely different case.

The Division Court, after a course of evolution, has been brought into line fairly well with the Supreme Court. Originally, no jury was allowed in the predecessor of the Division Courts; but now, either party may (in certain cases) demand a jury; he gives the proper notice and deposits the proper fees, whereupon a jury is summoned: secs. 124, 125, 127, 129; his case is placed on the “jury-list;” sec. 132 (1); and the jurors who actually try the case have a particular form of oath prescribed by Rule—see “Forms of Oaths,” etc., form 30 (g) and (h). This is, of course, subject to the provision introduced in 1921 giving the Judge power to take the case out of the jury’s hands (whatever that may mean): sec. 136 (4).

Where no jury notice has been given, the Judge may, notwithstanding, have the case or any disputed fact tried by a jury, in which case a jury of “five disinterested persons present” is called: sec. 134 (2). The qualifications and the form of oath are different in this case from those in the case of a jury notice. The

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former kind of a jury requires the qualification of being present and disinterested, while the latter requires (sec. 127 (1)) residence in the division, etc. The distinction between the two kinds of juries is marked; and the two kinds are not interchangeable.

Riddell,
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Unless we are to overrule *McEwen v. Little*, this judgment cannot stand. I would allow the appeal and direct a new trial with costs of the appeal and former trial.

This, of course, will not interfere with the discretion of the Judge on the new trial, under sec. 136 (4) or otherwise.

Perhaps the matter may be put this way: either the jury summoned by the clerk was properly called, in which case the action should have been tried by it; or it was not, in which case the action should not have been tried at all—this, of course, subject to the power of the Judge more than once mentioned.

ORDE, J.A.:—In this Division Court action the plaintiff gave notice that he required the issues to be tried by a jury.

The clerk of the Division Court thereupon summoned a jury, but at the opening of the trial counsel for the defendant took the objection that the clerk had not complied with the requirements of sec. 127 of the Division Courts Act, R.S.O. 1927, ch. 95, and that the jury summoned was therefore not competent to serve.

If the course thereupon taken at the trial did not make it clear that the jury had not been properly summoned, the fact is now established by the clerk's affidavit filed upon this appeal, in which he acknowledges that he failed to observe the provisions of the Act.

The learned trial Judge, instead of dealing with the defendant's objection upon its merits, disposed of the difficulty summarily by stating that he was going to call a jury from the body of the court, and this he directed the clerk to do, notwithstanding the further objection of counsel for the defendant, and the case was so tried and judgment entered for the plaintiff upon the jury's verdict.

The plaintiff relies upon sec. 134 as authority for the course taken by the learned trial Judge, but subsec. 1 does not apply, for there is no suggestion that the jury panel was exhausted, and the sole justification for the procedure taken, if it can be justified, must be found in subsec. 2, which provides that, "Where the judge thinks it proper to have the action or any controverted fact tried by a jury, the clerk shall instantly return a jury of five disinterested persons present, to try the same, and the judge may give judgment on the verdict of the jury."

But I think that subsec. 2 is only applicable to cases where no jury notice has been given, and the judge *ex mero motu* directs a trial by jury. It is impossible to strain the language of this section to meet the case of the failure to observe the strict requirements of secs. 125, 126, 127, and 129. Once either party has given a jury notice, those sections become operative, and either party is entitled to insist upon their strict observance. If the clerk fails to summon a jury in accordance with those requirements, the only remedy would appear to be a postponement of the trial. The Judge had no power to deprive either party of his right to have a trial by a jury qualified and summoned under the strict requirements of the Act.

The appeal should be allowed and a new trial had before a jury properly summoned. The appellant should have his costs of the appeal and of the abortive trial.

MASTEN, J.A., agreed with ORDE, J.A.

FISHER, J.A., agreed with the Chief Justice.

Appeal allowed and new trial directed.

[KELLY, J.]

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April 15.

Church — Property of Congregation Vested in Trustees upon Trusts Set out in Deed—Doctrinal Standards—Resolutions of Congregation Passed by Majority—Property-rights of Minority Adhering to Standards—Absence of Inherent Power to Change Statement of Doctrines.

The plaintiffs, who were five of the seven trustees of the lands described in a trust-deed, under which the lands were to be held in trust for the use, for the purposes therein set out, of the members of a Regular Baptist Church, brought this action against the other two trustees and the pastor and clerk of the church, seeking certain declarations and an injunction in effect restraining the defendants from excluding the plaintiffs and others associated with them from membership in the church and from sharing in the benefits derived from the church and the lands held by the trustees. By the trust-deed the lands were conveyed to the trustees, their successors and assigns forever, upon trust "that the same shall be held for the use, for the purposes aforesaid, of the members of a Regular Baptist Church, which church shall be exclusively composed of persons who have been baptised by immersion, and who hold the following doctrines" (setting out the doctrines). The plaintiffs and those associ-

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ated with them (being a minority of the church members) refused to sign an acceptance of certain "articles of faith" proposed to them by the defendants, representing the majority, and were, in consequence of their refusal, if certain resolutions passed at meetings of the congregation (the plaintiffs dissenting) were to govern, excluded from membership:—

Held, upon the evidence, that the "articles of faith" proposed by the defendants departed substantially from those set out in the trust-deed; the defendants and those whom they represented, although in the majority, had no right to impose upon the minority acceptance of their views; and the plaintiffs and those associated with them could not be deprived of the property held in trust on account of their adherence to the doctrines set out in the deed—a majority not adhering to these doctrines could not take the property away from the adherent minority.

There was no inherent or other power in the defendants to change the statement of doctrines, and the trustees had no authority to hold the property on any other trusts than those declared by the deed.

Craigdallie v. Aikman (1813), 1 Dow (H.L.) 1, *General Assembly of Free Church of Scotland v. Overtoun*, [1904] A.C. 515, and subsequent Canadian cases, followed.

ACTION for certain declarations and an injunction in respect of the property and affairs of the Hughson-street Baptist Church, in the city of Hamilton; and counterclaim by the defendants for an accounting and payment to the defendant Bower of moneys alleged to belong to the church.

The action and counterclaim were tried before KELLY, J., without a jury, at Hamilton.

Gideon Grant, K.C., and *W. F. Schwenger*, for the plaintiffs.
C. W. Bell, K.C., and *R. H. Yeates*, for the defendants.

April 15. KELLY, J.:—The plaintiffs are five of the seven trustees of the lands described in a deed of conveyance (hereinafter referred to as "the trust-deed") bearing date the 18th March, 1909, and registered in the registry office for the County of Wentworth on the 17th January, 1910, as number 110660, under which the lands were to be held in trust for the use, for the purposes therein set out, of the members of a Regular Baptist Church in the manner therein set forth. The defendants Friend and Potter are co-trustees with the plaintiffs under the trust-deed. The defendants Bower and Potter are respectively the pastor and clerk of the said church. The conveyance is unto the use of the grantees, their successors and assigns forever, upon trust "that the same shall be held for the use, for the purposes aforesaid, of the members of a Regular Baptist Church, which church shall be exclusively composed of persons who have been baptised by immersion, on a personal pro-

fession of their faith in Christ, and who hold the following doctrines" (the doctrines being then set out).

These lands were held, and used and occupied, in accordance with the terms of the trust-deed. .

On the 26th October and the 16th November, 1927, resolutions were passed by the defendants and others, but not consented to by or on behalf of plaintiffs and the members of the church in agreement with them and whom they now represent, which, the plaintiffs say, were intended to require the members of Hughson-street Baptist Church to join a new organisation then recently formed, and to exclude from membership those members who refused or failed to sign, not later than the 16th December, 1927, an acceptance of the articles of faith referred to in the minutes of the meeting of the 16th November as "new articles of faith;" those so failing were, without further action, to cease to be members of Hughson-street Baptist Church. As the resolution of the 16th November is an important factor in the evidence, I quote it at length, as follows:—

"Whereas the Hughson-street Regular Baptist Church by resolution decided to become a member of the Union of Regular Baptist Churches of Ontario and Quebec; and whereas the best interests of this church require that the entire membership should be united on a common basis of faith; and whereas as an organisation it has accepted the articles of faith embodied in the constitution of the said Union of Regular Baptist Churches of Ontario and Quebec as a true interpretation of the Faith once for all delivered to the Saints through the Holy Scriptures; therefore be it resolved, that this church require that every individual member of the church in order to continue membership in the church shall personally subscribe to the said articles of faith, and that the clerk of this church be hereby instructed to place in the hands of every member of this church a copy of the constitution of the Union of Regular Baptist Churches of Ontario and Quebec, on pages 5 to 8 of which are printed the said articles of faith, together with a copy of this resolution, which hereby informs every member of the Hughson-street Regular Baptist Church of the church's decision; and that every member of this Hughson-street Regular Baptist Church be and is hereby to sign a statement of their acceptance of the said articles of faith, which statement of acceptance shall be hereinafter set out; and that the clerk of the church is hereby instructed to deliver the said constitution and articles of faith with a copy of this resolution to each member of the church in such a way as will enable the said clerk to certify that every mem-

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ber of the said church has received the same; and that every member be and is hereby requested to return the signed acceptance of the said articles of faith to the clerk of this church, Mr. W. G. Potter, 156 Burlington-street east, Hamilton, Ont., not later than the 16th December, 1927; and that any member who fails to return his or her subscription to the said articles of faith to the church clerk by the 16th December shall then be considered to be out of harmony with the doctrinal position of this church and shall then on the said date, the 16th December, 1927, without further action by this church, cease to be a member of Hughson-street Regular Baptist Church."

The proposed certificate of acceptance was appended to the resolution in this form: "As a member in good standing of the Hughson-street Regular Baptist Church, I hereby certify that I have read the articles of faith of the Union of Regular Baptist Churches of Ontario and Quebec and that I heartily and without reservation subscribe to the said articles of faith as representing my own personal view of the Bible truth. And that my signature below indicates my desire and readiness to heartily co-operate in all the work of the Hughson-street Regular Baptist Church on the basis of the aforesaid articles of faith."

In pursuance of this resolution, there were sent to the members of the church copies of the constitution, of the resolution, and of the form of acceptance, which latter, however, the plaintiffs and other members refused to sign. Under the resolution those who refused to sign were regarded by the defendants and those whom they represented as having ceased to be members of the church on the 16th December, 1927. What was called the annual business meeting of the church was held on the 4th January, 1928, at which a resolution was passed that no person be allowed to discuss any business therat except members in good standing in the Hughson-street Regular Baptist Church. Those who had declined to sign were thus refused the right to take part in the meeting. Further light is thrown upon the attitude assumed by the defendants and in respect of the grounds on which they were proceeding by reference to another resolution passed at the same meeting as follows:—

"Whereas this Hughson-street Regular Baptist Church, at a meeting held on the 26th October, 1927, declared itself to be out of fellowship with the Baptist Convention of Ontario and Quebec, on the ground of its endorsement of the teachings of Pro. S. N. Marshall as being to the doctrinal standing of this church as requested in the doctrinal statement contained in the trust-deed of this property (*sic*).

"And whereas this Hughson-street Baptist Church by the same resolution expressed its agreement with the Union of Regular Baptist Churches of Ontario and Quebec, and authorised the clerk of this church in its behalf to make application for membership in the said Union of Regular Baptist Churches, and to sign on behalf of the church the articles of faith on constitution of said union.

"And whereas at a meeting held on the 16th November, 1927, this Hughson-street Baptist Church passed a resolution declaring that any and every member of this church who did not signify his agreement with this church's action in respect to these matters by the 16th December should from that date be considered to be out of harmony with the doctrinal position of this church and should cease to be a member of this church.

"Therefore this church as an independent self-governing sovereign body resolves that the resolution passed on the 16th November, 1927, is hereby confirmed, and that the deacons be and are hereby instructed to visit all members who have not replied to the communication of the church containing the resolution passed on the 16th November.

"And that every member refusing to comply with the church's decision as of that date be given a certificate of membership certifying that he or she was a member of the Hughson-street Baptist Church up to the 16th December, 1927.

"And that all members to whom such certificates are given shall be declared to be no longer members of Hughson-street Regular Baptist Church."

(Certificates of that character were accordingly issued to members who refused to sign the acceptance).

At that meeting a further resolution was passed, "that all offices, with the exception of that of pastor and trustees in this church, be declared vacant as from this hour, in order that every office should be filled by one who is in harmony with the aims and objects of this church; and that the various treasurers and church clerk be and are hereby instructed to deliver their books into the custody of the pastor until their successors are appointed." This is manifestly the foundation for the counterclaim, in which the defendants claim from the plaintiffs Wodell and Davidson an accounting and payment to the defendant Bower of moneys alleged to belong to the church or to certain "Funds" of the church.

The plaintiffs' claim is for a determination of the legality and effect of these various resolutions, in so far as they and the action taken thereon by the defendants and those whom they represent

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affect the position of the plaintiffs and their co-trustees as trustees of the said lands, and the membership status of the plaintiffs and those whom they represent or who adhere to the articles of faith set out in the said trust-deed. The plaintiffs (five trustees) ask: (1) a declaration that they and the defendants Potter and Friend hold these lands in trust for a congregation of those members of Hughson-street Regular Baptist Church who have not signed the certificate of acceptance of the declaration of faith as contained in the tentative constitution of the new organisation above referred to; (2) a declaration that the above referred to resolutions passed respectively on the 26th October and the 16th November, 1927, are, each, null and void; (3) a declaration that the said annual meeting held on the 4th January, 1928, was irregular and void; and (4) an injunction restraining the defendants from interfering in the administration of the affairs of the Hughson-street Regular Baptist Church and from parting with or otherwise dealing with its property.

Amongst the defences set up are that every Baptist church is self-governing and absolutely entitled to the control and disposal of its own affairs; and a denial that any articles of faith adopted or subscribed to by the defendants restricted an interpretation of, or made new additions to, the original declaration of faith contained in the said trust-deed, or that the new articles are in any way a modification of or variation from the said original declaration of faith. They also deny that they have signed an acceptance of articles of faith, and they allege that the plaintiffs and others on whose behalf the plaintiffs claim to be entitled to act have departed from the doctrinal standards written into the said trust-deed, and that the plaintiffs no longer subscribe to or endorse these standards. They claim also that the plaintiffs and those associated with them are out of harmony with the doctrines subscribed to by this church as a Regular Baptist Church; and contend that any pledges given to the defendants, or any of them or to any one on their behalf, were given only as pledges of adherence to the true doctrines of the said church with which the said church has always been identified.

A highly important question, therefore, is whether the declaration or articles of faith set forth and declared in the tentative constitution of the Union of Regular Baptist Churches of Ontario and Quebec (exhibit 8) is a variation of or departure from the essential parts of the doctrines laid down in the said trust-deed, in respect of which doctrines the trustees held the property in trust. If the new articles of faith embody variations of or depar-

tures from the doctrines declared in the trust-deed, the trustees by adopting them would be recreant to their trust and chargeable with committing a breach thereof. If the defendants appreciated this situation, it is not surprising that they should, as they did at the trial, emphasise their contention that the new articles of faith do not embody such variations or departures. In the defence-evidence great stress was laid upon the statement, appearing in para. 2 of the tentative constitution (exhibit 8) that the design and object of the Union of Regular Baptist Churches of Ontario and Quebec shall be . . . to co-operate with all Regular Baptists in the dissemination of the principles and doctrines held by Regular Baptist Churches, which said principles and doctrines are set out in the trust-deeds of the churches, usually in the following form (then follows the declaration of faith embodied in the trust-deed quoted above) "or in words similar thereto; . . . and further in elaboration thereof and any agreement therewith and as meeting the exigencies of the time, the principles and doctrines of the said society are further explained and more fully set out in the articles of faith set out in schedule 'A' attached thereto." It was urged, both in the evidence and in the argument, that the above reference in the tentative constitution to the declaration of faith set out in the trust-deed indicates an adherence thereto, and that what followed was, as the text of the constitution says, merely in elaboration thereof and as meeting the exigencies of the time. If the new articles of faith were in all essential respects the same as the articles set forth in the trust-deed, what reasonable purpose could there be in requiring the members who adhere to the latter to sign an acceptance of the new articles under pain of being deprived of membership in the church? This illogical situation does not seem to have occurred to the defendants, or, if it did occur to them, it did not impress them.

But the articles referred to in the "acceptance" which the members were asked to sign under penalty of forfeiting their membership are not the articles set out in the trust-deed, nor do they embrace all that is set out in the tentative constitution (exhibit 8), but only that part of the latter which was designated as schedule "A." Referring to the resolution above quoted of the 16th November, 1927, what was therein required was that every member, in order to continue membership, should personally subscribe to the new articles of faith, and the resolution goes on to say that the articles of faith to which the members are so required to subscribe are the articles of faith which are printed at pages 5 to 8 of the constitution of the Union of Regular Baptist Churches

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of Ontario and Quebec, and not everything that is contained in this constitution. In a document which must have been prepared with care, the excluding from the acceptance which the members were required to sign the articles of faith, as and in the form in which they appear in the trust-deed, cannot be regarded as accidental; it bears the marks of a deliberate and ingenious design of committing the signers of the acceptance to the articles of faith set out in schedule "A," to the exclusion of other parts of the tentative constitution.

In the trial-evidence, much importance was attached to whether these new articles of faith essentially depart from or are a variation of the articles set out in the trust-deed, and several persons of prominence in the Baptist Church (theologians, professors, teachers, etc.) were called to give their theological and professional opinion thereon. Without discussing the various views expressed, the conclusion from a consideration of all that class of evidence is that it supports the opinion which one may on other grounds reach, namely, that the new articles depart substantially from those in respect of which the trustees held under the trust-deed.

But the defendants have taken the position that they and those whom they represent, being a majority of the members, have a right to impose upon the minority acceptance of their views and decisions as they have attempted in this case. Authority, however, is not wanting to define the rights of the parties in circumstances such as have here arisen. Halsbury's Laws of England, volume 11, p. 820, para. 1586, states: "In the event of a schism among the members of one such body" (referring to certain churches) "the fact that the seceding party constitutes a majority either of the trustees or of the congregations does not of itself entitle the majority to claim possession of the premises. The nature of the original constitution must alone be looked to as the guide in such a case, and the *ratio decidendi* must be the inclusion in or exclusion from such constitution of an inherent power of alteration. The claims of those who adhere to the original constitution will be enforced unless such an inherent power is proved to exist and to have been exercised by the body authorised in the original constitution to exercise it within such limits as may have been prescribed."

In *Craigdallie v. Aikman* (1813), 1 Dow (H.L.) 1 (a report of a judgment of Lord Eldon), this appears at p. 16:—

"With respect to the doctrine of the English law on this subject, if property were given in trust for A, B, C, etc., forming a

congregation for religious worship; if the instrument provided for the case of a schism, then the court would act upon it; but if there were no such provision in the instrument, and the congregation happened to divide, he did not find that the law of England would execute the trust for a religious society, at the expense of a forfeiture of their property by the *cestui que trusts*, for adhering to the opinions and principles in which the congregation had originally united. He found no case which authorised him to say that the court would enforce such a trust, not for those who adhere to the original principles of the Society, but merely with a reference to the majority He had met with no case that would enable him to say, that the adherents to the original opinions should, under such circumstances, for that adherence forfeit their rights. If it were distinctly intended that the Synod should direct the use of the property, that ought to have been a matter of contract, and then the court might act upon it." See also *Attorney-General v. Pearson* (1817), 3 Mier. 353.

In *General Assembly of Free Church of Scotland v. Overton*, [1904] A.C. 515, the question of the right of a minority group (appellants) to hold the property concerned arose. The respondents contended that the Free Church had full power to change its doctrines so long as its identity was preserved. The appellants, a very small minority of the Free Church, objected to the Union (which had been proposed and urged) maintaining that the Free Church had no power to change its original doctrines or to unite with a body which did not confess those doctrines, and they complained of a breach of trust, inasmuch as the property of the Free Church was no longer being used for behoof of that church; and they brought the action in the name of the General Assembly of the Free Church asking for a declaration that they, as representing the Free Church, were entitled to the property, and it was held that the Free Church had no power, where property was concerned, to alter or vary the doctrine of the Church and that the appellants were entitled to hold for behoof of the Free Church the property held by the Free Church before the Union in 1900. The report is very lengthy, and I omit much that is necessary to a full understanding of the case. Lord Halsbury, at p. 613, cited the *Craigdallie* case with approval, and stated (pp. 612 and 613) that "the identity of a religious community described as a Church consists in the unity of its doctrines. Its creeds, confessions, formularies, tests, and so forth are apparently intended to insure the unity of the faith which its adherents profess." It was also further laid down that the bond of union of a Christian association

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may contain a power in some recognised body to control, alter, or modify the tenets or principles at one time professed by the association; but the existence of such a power must be proved.

To set at rest any doubt as to the manner in which the Court has to approach a question such as has been raised here, I quote the language of Lord Halsbury at p. 613 of the report just referred to, that "in the controversy which has arisen, it is to be remembered that a Court of law has nothing to do with the soundness or unsoundness of a particular doctrine. Assuming there is nothing unlawful in the views held . . . a Court has simply to ascertain what was the original purpose of the trust. . . . I do not think we have any right to speculate as to what is or is not important in the views held. The question is what were, in fact, the views held, and what the founders of the trust thought important." And on p. 617, after a lengthy quotation from *Dill v. Watson* (1836), 2 Jones Rep. (Ir. Ex.) 48, Lord Halsbury said that "it would seem that it may be laid down that no question of the majority of persons can affect the question, but the original purposes of the trust must be the guide."

In the same case Lord Davey, at p. 645, said that the function of the Civil Court is to determine whether the trusts imposed upon property by the founders of the trust are being duly observed; and he added: "The question in each case is, What were the religious tenets and principles which formed the bond of union of the association for whose benefit the trust was created? I do not think that the Court has any test or touchstone by which it can pronounce that any tenet forming part of the body of doctrine professed by the association is not vital, essential, or fundamental, unless the parties have themselves declared it not to be so. The bond of union, however, may contain within itself a power in some recognised body to control, alter, or modify the tenets and principles at one time professed by the association. But the existence of such a power would have to be proved like any other tenet or principle of the association."

This case was cited and followed in *Forler v. Brenner* (1922), 21 O.W.N. 489, an action by Forler and three others, on behalf of themselves and all other members of St. Jacob's Evangelical Lutheran Church at Baden, Ontario, who were adherents of the Evangelical Lutheran Synod of Canada, for a declaration that the plaintiffs and those whom they represented composed the congregation of the church and were entitled to all the church property, etc. The trial Judge stated that, even if those who desired to secede were a majority of the members, and had, at a meeting

duly called, resolved to secede, of which proper notice was given, the plaintiffs, as adherents of the body by which the church was governed, were entitled to the use of the property without reference to whether they constituted a majority; and judgment was given accordingly that the plaintiffs, with such other members of the congregation as might desire to remain affiliated with the original body, were entitled to all the church property, as against the defendants, who, it was held, were, when the action was instituted, wrongfully in possession of the church property.

The *Overtoun* case was also followed by the Manitoba Court of Appeal in *Anderson v. Gislason* (1920), 53 D.L.R. 491, the head-note of which is:—

“Where a church organisation is formed for the purpose of promoting certain defined doctrines of religious faith which are set forth in its corporate articles or constitution, the church property which it acquires is impressed with a trust to carry out that purpose, and a majority of the congregation cannot divert the property to inconsistent uses, against the protest of a minority however small.”

An earlier case to the same effect is *Stein v. Hauser* (1913), 15 D.L.R. 223 (Saskatchewan Supreme Court).

In a case in the Province of Alberta, *Hennig v. Trautman*, [1926] 2 D.L.R. 280, the subject is fully discussed. The head-note is:—

“Where property is placed in trust for a religious congregation, in the case of religious differences in the congregation the beneficiaries of that trust are to be determined as those members of the congregation who adhere to the religious principles of the original creators of the trust, and a majority not adhering to those principles cannot take the property away from the adherent minority.”

This seems to be in accordance with the general trend of the earlier decisions and may well be followed here.

A case decided by the Ontario Court of Appeal, *Vick v. Toivenen* (1913), 4 O.W.N. 1542, though not a church case, is useful as laying down the principles which may be applied here. The action was on behalf of certain members of a society to restrain the society from joining the Socialist Party of Canada and from diverting its assets to the purposes of that party. In the reasons for judgment it is stated that it is a well-established principle of law that the property of a voluntary society cannot be diverted by a majority of its members from the purposes for which it was given by those who contributed to it, or devoted to purposes that are alien to or in conflict with the fundamental rules laid down by the society, and the dissenting minority who adhere to these

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rules are entitled to have them restrained from so doing. The Court, without expressing any opinion as to the merits of the principles of the party to which the majority in that case had decided to affiliate the society, was of opinion that their compulsory and restricted methods were at variance with the fundamental principles of freedom of opinion on which the society was founded; and that those who contributed to the property and funds of the society for the propagation of these ideas had a right to complain when it was sought to divert these funds into another channel and to prevent them from enjoying the advantages of the society and its property unless they submitted to restrictions inconsistent with the principles on which the society was founded. The result was that the defendants were restrained from diverting the property or the moneys of the society in question to the Socialist party or depriving the members of the society of any rights or privileges unless they joined or contributed to that party.

This was followed in 1924 in *Brylinski v. Inkol*, 55 O.L.R. 369, where it was held that the plaintiffs, representing the trustees of a society's property and those who adhered to the original tenets of the society, though a minority of the members, were entitled to a declaration that the defendants and the majority whom they represented had acted illegally; and an injunction was granted restraining the latter from using the property and assets of the society for other than its original purposes.

There is here no inherent or other power in the defendants enabling them to change the statement of doctrine, and there is no authority in the trustees to hold the property on any other trusts than those declared by the trust-deed; and even though, as alleged by the defendants, every Baptist Church is self-governing and entitled to the control and disposal of its own affairs, that, under the authorities already cited and others, would not entitle the defendants to adopt the course they followed as set out in the resolutions to which the plaintiffs have taken exception.

The defendants have also failed to prove that the plaintiffs and those on whose behalf they act have departed from the doctrinal standards written into the trust-deed, or that they no longer subscribe to or endorse these standards, or that they are out of harmony with those doctrines. They have failed to establish any of the grounds of defence on which they rely. On the other hand, the plaintiffs have shewn sufficient ground for the relief they ask, and judgment should go in their favour with costs.

The counterclaim arises out of and is dependent upon the fate of the plaintiffs' claim. Upon it also the defendants have failed, and it will, therefore, be dismissed with costs.

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RE CARRICK.

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April 17.

Will—Bequests to Charities—Erroneous Designations of Institutions—Equivocal Description — Intention of Testator—Admission of Extrinsic Evidence—Presumption against Double Legacy.

By his will the testator bequeathed \$3,000 to "The Protestant Orphan Boys' Home, Toronto," and \$3,000 to "The Protestant Orphan Girls' Home, Toronto." There were no institutions bearing those names; but there was in Toronto an institution, incorporated in the year 1863, known as "The Girls' Home," and another, incorporated in 1851, known as "The Protestant Orphans' Home." These two were amalgamated in 1926 under the name of "The Protestant Children's Homes." There was also in Toronto an institution, incorporated in 1861, known as "The Boys' Home." The will was executed in 1928, and it was shewn that in a previous will, executed in 1926, these two bequests appeared in the same words:—

Held, that the bequest to the Protestant Orphan Girls' Home should be paid to the Protestant Children's Homes, as successor of the Girls' Home, there being in Toronto no other institution of a like name or having similar objects, and the testator's sister being interested, to his knowledge, in the Girls' Home.

The other legacy was claimed by the Protestant Children's Homes and also by the Boys' Home, neither coming exactly within the designation used in the will:—

Held, that extrinsic evidence is admissible to shew which of several persons or things is intended under an equivocal description; and, the language here used being equally applicable to either claimant, declarations of the intention of the testator, both before and after the dates of the wills, were admissible; and the Court had also a right to consider the circumstances and the interest of the testator and his family in the Boys' Home and the fact that he had no interest in the Protestant Orphans' Home.

There is also a presumption against a double legacy.

Held, therefor that the Boys' Home was entitled to the legacy given to the Protestant Orphan Boys' Home.

Review of the authorities upon the admission of extrinsic evidence.

APPLICATION on behalf of the Protestant Children's Homes for an order declaring that the applicant is the beneficiary intended and designated by the last will and testament of John Carrick, deceased.

April 15. The application was heard by WRIGHT, J., in the Weekly Court, Toronto.

Wilfrid Heighington, for the applicant.

F. C. L. Jones, K.C., for the Boys' Home.

A. L. Smoke, for the executors.

April 17. WRIGHT, J.:—This will is dated the 7th July, 1928, and the clauses out of which the difficulty arises are as follows:—

Wright, J. "(e) To the Protestant Orphan Boys' Home, Toronto, the sum
1929. of \$3,000 for its objects and purposes.

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CARRICK. "(f) To the Protestant Orphan Girls' Home, Toronto, the sum
of \$3,000 for its objects and purposes."

From the affidavit of Mr. Smoke, who drew this will, it appears that the clauses already cited appeared verbatim in a former will of the deceased dated the 8th July, 1926.

It now appears that there are no institutions bearing the designations in the clauses cited. For a number of years there existed in the city of Toronto an institution known as "The Girls' Home," which was incorporated in the year 1863, and there was also an institution known as the Protestant Orphans' Home, incorporated by statute in the year 1851. These two institutions were amalgamated by an Act of the Legislature of Ontario entitled "The Protestant Children's Homes Act, 1926," which was assented to on the 8th April, 1926.

It will be noted that at the date of both of the wills the amalgamation of the two first named institutions had been effected.

It also appears that for a number of years there existed an institution known as "The Boys' Home," with its headquarters in George-street in the city of Toronto. This institution was incorporated by statute in 1861.

The affidavit of Elizabeth C. Allen, a sister of the deceased, states that in their family the latter institution was generally referred to by the name of the Protestant Boys' Home, which was its original designation, and it was the frequent subject of conversation between herself and her brother, the testator.

The question now arises as to which of these two institutions is entitled to the legacy. It is quite obvious, and indeed it is not seriously contested, that the bequest to the Protestant Orphan Girls' Home should be paid to the Protestant Children's Homes, as being the successor of the former institution known as the Girls' Home. It is established that there was not in Toronto any other institution of a like name or having similar objects, and it further appeared that Elizabeth C. Allen, sister of the testator, was interested in that institution, to the knowledge of the testator. This disposes of the bequest secondly mentioned.

As to the institution entitled to receive the first mentioned legacy there is considerable doubt. If the wording of the will is construed strictly, neither of the institutions claiming this legacy comes within the designation used in the will, and it therefore falls to be determined whether and what extrinsic evidence is ad-

missible to aid in the construction of the will so far as regards this legacy.

From the affidavits filed it appears that the mother of the testator was in her lifetime greatly interested in the institution known as the Boys' Home, and that the work done there was the frequent subject of discussion between the testator and his mother. The affidavit of Mrs. Allen further states that the testator told her, on the occasion of making his first will, that he had made a bequest of \$3,000 to the Boys' Home in George-street and that when he made the second will he had stated he had left the gifts to the charities exactly as before.

She further deposes that she had never at any time heard the testator refer to the institution known until 1926 as the Protestant Orphans' Home, in Dovercourt-road, Toronto.

An affidavit of Sarah Jane Brien, a cousin of the testator, has also been filed, and in it she deposes that the testator stated to her that he was making or had made a bequest of \$3,000 to the Boys' Home in George-street.

If this evidence is admissible, it would clearly shew the institution intended to be benefited by the testator, but the authorities are not in agreement as to whether extrinsic evidence of this nature is admissible to aid the Court in solving a difficulty such as that raised in the present case. The law appears to be that extrinsic evidence is admissible only to determine which of several persons or things was intended under an equivocal description. See Hawkins on Wills, 2nd ed., p. 14. Are the descriptions here equivocal so as to admit the extrinsic evidence? In *Doe d. Hiscocks v. Hiscocks* (1839), 5 M. & W. 363, it would appear that the Court held that extrinsic evidence is admissible only where the meaning of the testator's words is neither ambiguous nor obscure and where the devise is on the face of it perfect and intelligible, but from some of the circumstances admitted in proof ambiguity arises. In *In re Clergy Society* (1856), 2 K. & J. 615, it was held that in the case of institutions bearing similar names, there being no society designated exactly as stated in the will, but several societies popularly called "clergy societies," there was an equivocal description; and in *Doe d. Allen v. Allen* (1840), 12 A. & E. 451, it was held that description may be equivocal although the context favours one of the objects.

The last decision touching the point appears to be the judgment of Sargent, J., in *In re Ray*, [1916] 1 Ch. 461, where at p. 465 he says in part: "But then arises the question whether the evidence as to intention is admissible when the description in the

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Wright, J. will is equally applicable to two or more persons but imperfectly descriptive of each of them. . . . In my opinion the evidence would be admissible."

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In *Charter v. Charter* (1874), L.R. 7 H.L. 364, Lord Cairns, in dealing with the question as to admissibility of extrinsic evidence, at p. 377, says: "The only case in which evidence of this kind can be received is where the description of the legatee, or of the thing bequeathed, is equally applicable in all its parts to two persons, or to two things." It will be noted that the language used by Lord Cairns is "equally applicable," not "completely applicable."

Can it be said that the language used in the will under consideration describing the beneficiaries is equally applicable? Neither of them comes within the exact designation in the will, one being the Boys' Home and the other the Protestant Orphans' Home. It will be noted that in one description the word "Protestant" appears and not the word "Boys," whereas in the other the term "Boys" appears but not the word "Protestant." So it would appear that the description is equally applicable to either of these institutions. Applying the reasoning and principle of the decisions already referred to, I am of opinion that extrinsic evidence is admissible, and that the declarations of the intention of the testator, both before and after the dates of the wills, are admissible.

In addition, the Court has a right to consider the circumstances and the interest of the testator and his family in the Boys' Home, and the fact that so far as disclosed he had no connection with or interest in the other institution known as the Protestant Orphans' Home.

Having regard to all the evidence, and particularly the declarations of the testator, it is reasonably clear that the legacy was intended for the Boys' Home. I so hold.

I was also impressed by the argument of Mr. Jones to the effect that the presumption is against a double legacy. It has already been held that the Protestant Children's Homes is entitled to the legacy of \$3,000 bequeathed in the will to the Protestant Orphan Girls' Home, and if it were held that this institution was also entitled to the other legacy of \$3,000 bequeathed by the will to the Protestant Orphan Boys' Home, Toronto, it would offend against the well established rule: "If a legacy of the same amount to the same person be repeated . . . in one and the same testamentary instrument, *prima facie* the legatee is entitled

to one legacy only." See Hawkins on Wills, 2nd ed., p. 355, and cases there cited.

This subject is also treated in Jarman on Wills, 6th ed., p. 1120 *et seq.*, and in White & Tudor's Leading Cases in Equity, 8th ed., vol. 1, p. 910.

If it were necessary to decide this point, I think this contention would be sufficient to turn the scale in favour of holding that a double legacy was not intended by the will, and therefore the Boys' Home, which was not otherwise benefited by the will, is entitled to the legacy.

Costs of all parties may be paid out of the estate—those of the executors between solicitor and client.

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[APPELLATE DIVISION.]

LEFEBVRE v. MAJOR.

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Will — Lost Will — Presumption of Destruction by Testator Animo Cancellandi — Evidence to Rebut.

April 19.

Where a will duly executed, traced to the testator's possession and last seen there, is not forthcoming on his death, the presumption is that it was destroyed by himself. The presumption may be rebutted by evidence, which, however, must be clear and satisfactory. In this case, where probate of a lost will was decreed by a Surrogate Court Judge, it appeared that the testator had his will in his possession shortly before his death, and that upon his death it could not be found. The evidence shewed a possibility of its having been accidentally destroyed by others after the death:—

Held, by a majority of the Court, on appeal, that the presumption had not been rebutted, and the will should not have been admitted to probate, even if the due execution of it was satisfactorily established and sufficient proof of its contents given.

Per LATCHFORD, C.J., and ORDE, J.A., dissenting:—The due execution was proved and proof of the contents made, but the circumstances in evidence rebutted the presumption of destruction by the testator himself, *animo cancellandi*.

Review of the authorities.

Colvin v. Fraser (1829), 2 Hagg. Ecc. 266, *Sugden v. Lord St. Leonards* (1876), 1 P.D. 154, and *Allan v. Morrison*, [1900] A.C. 604, specially referred to.

An appeal by the defendants from a judgment of the Surrogate Court of the United Counties of Stormont Dundas and Glengarry admitting to probate the lost will of Alexandre Zotique Pigeon, late of the town of Alexandria, in the county of Glengarry.

February 18 and 19. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

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H. H. Davis, K.C., for the appellants, argued, first, that there was not enough evidence to prove the due execution of the lost will: *Woodward v. Goulstone* (1886), 11 App. Cas. 469; *Howith v. McFarlane* (1924), 56 O.L.R. 375; and, secondly, that there was insufficient evidence to rebut the presumption that the will had been destroyed by the deceased, *animo revocandi*: *Barkwell v. Barkwell*, [1928] P. 91; *Re Perry* (1924), 56 O.L.R. 278; *Stewart v. Walker* (1903), 6 O.L.R. 495; *Colvin v. Fraser* (1829), 2 Hagg. Ecc. 266, at p. 346; *Allan v. Morrison*, [1900] A.C. 604.

Osias Sauvé, for the plaintiff, respondent, contended that the due execution of the lost will had been proved, and that there was ample evidence to rebut the presumption of wilful destruction. On the latter point he referred to *Sugden v. Lord St. Leonards* (1876), 1 P.D. 154, and *Bell v. Matthewman* (1920), 48 O.L.R. 364.

April 19. RIDDELL, J.A.:—The deceased was a native of the eastern part of this Province, but, as all agree, he went to British Columbia many years ago, and acquired a little property. In 1923, he disposed of his land to an electric company; on receiving the purchase-price, he went to the branch bank at Vancouver of the Bank of Montreal, and deposited a considerable part of it in that bank; the manager, taking an interest in him and finding that he had not made a will, advised him to have his will made, and made an appointment for him with a respectable firm of solicitors—he was then about to depart for his natal neighbourhood in eastern Ontario. The solicitors are said to have drawn a will for him—and, as my judgment does not depend upon the execution of the alleged will, I am content, for the purposes of this judgment, to consider it proved, though I do not so decide. This document he deposited in the bank for safe-keeping, on the 22nd November, 1923; if either that will or a later one to be mentioned was properly executed, it would be sufficient; any want of due execution of the second would bring in the doctrine of dependent relative revocation.

On or about the 21st February, 1924, a change was made by the solicitors; the original will had been in the name of "Peter Pigeon," and the testator desired his right name to appear. Accordingly, he seems to have gone to the bank, obtained the original will, and, going to the solicitors' office, had the proper change made, took the new document to the bank and deposited it as he had the original. The witness, wholly impeccable and not discredited by any one, called by the proponents, describes the extreme care with which the testator treated the document—"I know he kept that envelope in his hand, he thought it was very precious, you see,

he held on to it tight." This conception on his part of the great importance—the preciousness—of the document is not without significance in view of after-events.

He had one living sister, the actual proponent, to whom he wrote, on the 2nd March, 1924, telling her, *inter alia*, that he had left her his property, that he had named her and two others, whom he named, as executors, and had left it at the bank—"no one may lay their hands on my testament during my life." Nothing else is said of the contents of the will. Shortly thereafter, he went east, leaving the will in safe-keeping in the bank. He went to the house of his sister, Mrs. Lefebvre, after an absence of some forty years; this was in August, 1924; he stayed with his sister till the following March, went to a hospital and returned, and then left the sister's and went to Alexandria about the 1st May. He bought a small property in Alexandria, and "bached it." Before leaving, he gave his sister "a little recompense." He died in May, 1928.

Immediately upon leaving his sister's, he wrote to Vancouver for his will; the letter is not very literate; it reads as follows:—

"Alexandria, Ont.,
May 3rd, 1925.

"Bank of Montreal,
Carrel St.,
Vancouver, B.C.

Dear Sirs:—Any paper that comes to the name Mr. Lefebvre and Peter Pigeon d'ont give any money. Any paper that come to the Bank Except Peter Pigeon alone no other name is no good. Will you send my testament that is in your safe to Mr. Peter Pigeon, Alexandria, Ontario."

The learned Surrogate Court Judge—perhaps from some knowledge of the psychology of the class—suggests that he "seemed to think, because he put Lefebvre's name as an executor in his will, that that gave Lefebvre the right to draw money in some way out of the bank—his money." This may be the case; but when the statement is made that "there is no other explanation of this letter to the bank," my common sense is shocked. One very simple explanation is that he wanted to have the will in his possession, either to destroy it or have it altered. I do not press the fact that this desire to have the will in his own possession came into existence immediately after his leaving his sister's; and the most likely explanation is that by reason of something that had occurred he desired to live with his sister no longer, and also to get rid of the existing will. However that may be, on any theory, the occurrence

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shews his strong sense of the great importance of having the will in safe hands—the great care he took of the will at all times.

As indicating the carefulness of Pigeon, we have the further fact that he got his solicitor to send to Vancouver for the Government bonds which the bank had bought for him—these he left with his solicitor.

At every turn, we see the careful French Canadian, seeing to it that nothing can happen to his documents—that they are always secure from interference. The natural inference would surely be that having kept the will in the bank, and valuing—perhaps overvaluing—its importance, he would have again put it in a place of safety, if he intended it to remain in force. Nothing of the kind is done, no mortal eye save his own seems to have seen the will after it came to his possession in Alexandria in May, 1925; from that time until he died some three years elapsed; and on his death no will could be found, although his business papers, deeds, receipts, etc., were found in a trunk, a cupboard, and behind the clock.

The learned Surrogate Court Judge, disregarding, as I think, what has been perfectly established law for centuries, has granted probate of the lost will.

In the consideration of this case, we are not to trouble about the wisdom or propriety of the will; the doctrine of *Testamentum non officiosum*, which plays so great a part in the Civil Law, has no footing in ours; and any effect it might have in certain jurisdictions is rightly excluded in ours.

It is undoubtedly law that “where a will duly executed, traced to the testator’s possession and last seen there, is not forthcoming on his death, the presumption is that it was destroyed by himself.” *Allan v. Morrison*, [1900] 604 (P.C.) The reason given for this presumption by Mr. Baron Parke (afterwards Lord Wensleydale) in *Welch v. Phillips* (1836), 1 Moo. P.C. 299, at p. 302, seems to me of more than usual cogency in the case of this illiterate who expressed such solicitude for the safety of the will. Parke, B., says:—

“It is a presumption founded on good sense; for it is highly reasonable to suppose that an instrument of so much importance would be carefully preserved, by a person of ordinary caution, in some place of safety, . . . and if, on the death of the maker, it is not found in his usual respositories, or else where he resides, it is in a high degree probable, that the deceased himself has purposely destroyed it.”

This statement of the law is not questioned; but it is urged that the presumption is met and overcome by the facts disclosed in evidence.

The evidence is comparatively slight: we have a hardware clerk, Lalonde of Alexandria, a friend of Pigeon's, who, when "kidding" one day, said to him, "Why don't you give me that?" (they were speaking of his money); he said that all his money had been willed to his sister; this, of course, was true whether the will had been destroyed or not, but it looks more like a "kid" in answer to Lalonde's "kid"—in any case the conversation was obviously of the most trivial character.

The other evidence is a little different: Louis Pelletier, like Pigeon, an old Westerner, who had had the fortune to return to Ottawa, where he went into business as a contractor, having some work in Alexandria, used to see Pigeon occasionally. He saw Pigeon, apparently in May, 1928, and consequently a few weeks at most before his tragic death—the following is his account:—

"His Honour: Tell us about any conversation you had this year.

"Witness: That was May last I seen him, I went there to have a smoke once, and he would talk, and he says, 'I don't have to work any more; I have money to live on the interest.' And then I told him, I said, 'What are you going to do with that money?' and he says, 'I got affairs fixed up if I die, I only have one sister living;' me, I don't know Mrs. Lefebvre was living in Alexandria, I don't know whether she was dead, all he told, if he die, if anything happen to him, all his paper was made.

"Mr. Costello: I suppose my objection follows all through this line of evidence, your Honour?

"His Honour: Yes.

"Witness (continuing): He said he had only one sister living any if anything happened—

"His Honour: Everything went to her.

"Witness: I don't know her; I know the name, that is all.

"His Honour: Did he say he had his affairs arranged or settled?

"Witness: He said, 'All my papers is fixed up so if anything happen to me, I have only one sister, everything goes to her.'

(There must, of course, be some misreporting here: no Judge would prompt any witness as his Honour is here said to have done).

The very great care that is to be taken as to acting upon such statements, as meeting the presumption of personal destruction of the will, has been a commonplace for nearly a century and a half.

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Sir William Wynne in the Prerogative Court in 1793 in the case of *Freeman v. Gibbons*, quoted by Sir John Nicholl in *Colvin v. Fraser*, 2 Hagg. Ecc. at pp. 328, 329, says:—

“The executed will cannot be produced. . . . Two witnesses speak to declarations of the deceased, recognising the existence of the will a short time before his death; this affords strong presumptive evidence that he adhered to the will, but not conclusive proof, for the declaration may have been insincere. . . . Recognitions, because they may be insincere, are no proof of the fact that the will was in existence at that time; it may have been destroyed before.”

And Sir John Nicholl adds (p. 329):—

“Under these circumstances, there being a possibility and ability on the part of the deceased to have destroyed the will, Sir William Wynne pronounced against the instructions propounded. In *Naumgarten v. Pratt*, in the Prerogative Court, Easter Term, 1796, the same Judge pronounced a similar decision.”

Lord Eldon in *Pemberton v. Pemberton* (1807), 13 Ves. 290, says:—

“Few declarations deserve less credit than those of men as to what they have done by their wills” (p. 301); and, at p. 313, Lord Erskine, L.C., says: “The loose declarations of the testator, under circumstances imposing upon him no obligation of veracity, are nothing.”

Again Lord Eldon in *Ex p. Pye* (1811), 18 Ves. 140, at p. 148, says that “declarations . . . from the very nature of mankind deserve little credit.”

These decisions came on for consideration in the leading case of *Colvin v. Fraser*, 2 Hagg. Ecc. 226, and were wholly approved by Sir John Nicholl, who (p. 346) says: “This has always been the doctrine not only in these Courts but of all other Courts. . . . that recognitions of a will—even a few days before the testator’s death—were no proof of the fact of its existence. . . .”

Of course, there may be cogent evidence shewing that the testator must be in earnest—he may be discussing his affairs with his solicitor or business agent; he may be asking advice as to what he should do—there may be a score of occasions upon which it must almost necessarily be held that he meant what he said. Nothing of the kind appears here—the only statements made were made to one apparently jokingly and to another who had no interest in the matter at all. I can find nothing to justify us in departing from the long-established rule—even were we not to press that in any event the last expression was made a month or so before the death.

My conclusion is that the binding cases compel us to hold that the presumption of destruction by the testator himself has not been met. There is nothing to indicate that this careful man would allow his will out of his control; and nothing to indicate the destruction of the will improperly by one not entitled to do so. In that respect, as is pointed out in the English cases, there is also the presumption against crime; and the law as approved by the Judicial Committee is that where there is a reasonable possibility that the testator destroyed the will himself the will cannot be established: *Allan v. Morrison*, [1900] A.C. at p. 609.

There can be no object in quoting the many cases on this point—it will be sufficient to say that most of them are cited in Theobald on Wills, 8th ed., p. 55.

The difficulty arising from the conduct of the testator, I would direct the costs of all parties to be paid out of the estate, those of the executors between solicitor and client.

MASTEN, J.A.:—The facts in this case are not substantially in dispute and are adequately stated in the judgments of my Lord and of my brother Riddell.

Two questions are raised on this appeal: (1) Is the presumption of revocation arising from non-production of the will rebutted by the evidence? (2) Is the due execution of the will established?

The first question to be discussed is whether the will in question was revoked. Not being forthcoming, the *prima facie* presumption is that it was revoked by the testator, in whose custody it was, and the point to be determined is whether, in the circumstances of the case, that presumption has been rebutted. As was said by Vaughan Williams, L.J., in *In re Sykes* (1907), 23 Times L.R. 747, at p. 748:—

"In considering that question what one had to consider was whether upon the evidence there was such an improbability of the fact which was presumed true as to justify the Court in saying that the presumption was repelled. It was manifest that that raised a question of fact and of degree, upon which different judges might arrive at different conclusions. The question was always whether there was such evidence as to make it right for the Court to say that the presumption was so attenuated and so weakened that the Court ought not to act upon it."

It is well recognised that the presumption may be stronger or weaker according to the circumstances attending the custody of the will; and the evidence indicating that the will was actually in existence unrevoked at the time of the testator's death neces-

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sarily varies in every case. Consequently little assistance can be derived from former decisions on particular facts. Nevertheless, the reported cases are of value in so far as they afford examples and illustrations of the way in which the presumption has been treated in particular cases by eminent Judges. I incline to the view that these cases do develop a principle which is to be applied, but if that is too strong an expression they at least afford a guide, which I think ought not to be disregarded. The leading case is *Allan v. Morrison*, [1900] A.C. 604. That was an appeal from the Court of Appeal of New Zealand, and the opinion of the Privy Council was delivered by Lord Davey. At p. 609 of the report he quotes the judgment of the trial Judge (Denniston, J.), as follows :—

“The result in my mind of a consideration of all the evidence is that, while, as I have said, there were grounds for a strong presumption that the will would have been found existing at the testator’s death, I am not (to use the words of one of the judgments cited) morally convinced that the will was not destroyed by the testator *animo cancellandi*. That being so, the presumption arising from the fact of its being traced to the testator’s possession and its non-production at his death that it was so destroyed has not been rebutted.”

And Lord Davey then quotes the words of the Court of Appeal as follows :—

“The hypothesis of accidental loss or destruction is unreasonable. There is a presumption against the hypothesis of fraudulent abstraction. There is a reasonable possibility that the deceased destroyed the will himself. In order to find for the will we must be morally satisfied that it was not destroyed by the testator *animo revocandi*. We are not so satisfied.”

At the conclusion of his judgment Lord Davey says :—

“Their Lordships are of opinion that there is no objection to the way in which the law was applied by the learned Judges to the facts before them, and that their judgment was correct. Certainly there is no reason why their decision that the presumption was not rebutted should be disturbed.”

In *In re Sykes*, 23 Times L.R. 747, the judgment of the majority of the Court (Lord Justice Buckley and Lord Justice Fletcher Moulton) maintained the presumption, and in the course of his judgment Buckley, L.J., says :—

“The decision of Lord Penzance in *Finch v. Finch* (1867), L.R. 1 P. & D. 371, was referred to. Lord Penzance there said at p. 347: ‘It is the non-existence of the paper at the time of death which leads to the legal presumption of revocation. A will is good

unless revoked, but this will is not revoked unless the legal presumption arises; and to support that presumption the court must be satisfied that it was not in existence at the time of death.'"

The learned Lord Justice then says, with respect to the above quotation, that, if he rightly understood the presumption, that passage was wrong; and Lord Davey in *Allan v. Morrison* did not adopt any such proposition; that to require evidence of the non-existence of the will would be to deny the presumption.

In *Re Perry*, 56 O.L.R. 278, the judgment of this Court was written by my brother Middleton, and in it he says (p. 281):—

"I have great difficulty in persuading myself that the true result of the evidence is that stated by the learned Surrogate Court Judge. All of the cases, among which perhaps *Allan v. Morrison*, [1900] A.C. 604, is the strongest, go to shew that, when a testator has possession of his testamentary instrument, and it is not forthcoming at the time of his death, the presumption is that he destroyed it. The presumption is against fraudulent abstraction either before or after death, but circumstances which render the abstraction possible must be taken into account in weighing the evidence. The heretical statement of Lord Penzance in *Finch v. Finch*, L.R. 1 P. & D. 371, is overruled by *In re Sykes*, 23 Times L.R. 747."

The principle was more recently applied by my brother Kelly in the case of *Campbell v. Lindsey* (1925), 29 O.W.N. 86, where probate of the lost will was refused and the presumption of revocation maintained.

These decisions appear to me to establish the principle as it is stated in Halsbury's Laws of England, vol. 28, para. 1140: "The presumption may be rebutted by evidence, which, however, must be clear and satisfactory."

If this were a case of balancing the probabilities on conflicting testimony in an action of contract or tort, my judgment would be in favour of the plaintiff. I think that the probabilities are that the will existed unrevoked at the death of Pigeon, but, as I understand the law applicable in such a case, that is not enough, and I have been unable to rid my mind of a substantial doubt as to whether this will may not have been destroyed by the testator *animo cancellandi*. If that doubt could be removed, the opinions of my Lord and of my brother Orde (which I have taken the opportunity of re-reading and fully considering not only with respect but with admiration) would have dissipated it. The doubt still remains, and the words of Denniston, J., already quoted from *Allan v. Morrison*, express more aptly than I can the conclusions to which I am driven.

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Having reached on this ground the conclusion that the appeal should be allowed, I deem it unnecessary to consider whether the will propounded was duly executed, and on that question I refrain from expressing an opinion.

FISHER, J.A., agreed with RIDDELL, J.A.

LATCHFORD, C.J.:—A man named Alexandre Zotique Pigeon left eastern Canada at the age of 24 and went to British Columbia, where he lived for more than 40 years. He was a bachelor and had acquired landed property which was purchased late in 1923 by a Hydro-Electric Company.

Pigeon was illiterate, but was able to write his name. He had but an imperfect knowledge of the English tongue, and in business matters secured the assistance of a neighbour, Zoel Cyr, of Dewdney, B.C., who knew English as well as French and was a man of some education. When Pigeon sold his property, he took Cyr with him to Vancouver and placed the proceeds of the sale, about \$14,000, on deposit in a branch of the Bank of Montreal, of which one Stanley Edward James was manager. Mr. James advised Pigeon to have a will made and gave him the name of H. A. Bourne, the senior partner in the well-known legal firm of Bourne & Des Brisay. The two men proceeded to the law office, saw Mr. Bourne there, and Mr. Bourne prepared for Pigeon a will.

When first called as witness, Cyr deposed that Bourne read the will aloud to Pigeon in Cyr's presence, and that the will gave all the testator's property to his sister, Marie Felicité Lefebvre; that he saw Pigeon sign the will; that Mr. Des Brisay was called in to witness it, and that Cyr witnessed it himself.

Neither Mr. Bourne nor Mr. Des Brisay have any recollection of the contents of the will, nor had either at first any recollection that Pigeon had been in their office. All Mr. Bourne could remember when he first gave evidence was brought to his mind by an entry in the receipt-book of his office of the 21st February, 1924, of a fee for drawing Pigeon's will. He did remember that another man, whom he recognised when giving evidence as Cyr, was present with Pigeon. Later on in the day on which Mr. Bourne gave this evidence he returned to court and deposed that he remembered that a will had been made at an earlier date, and, having had a search made in his office, he found an entry of the 22nd November, 1923, which he says was a receipt to Mr. Pigeon for "drawing will again;" so he said that "apparently a will was drawn and redrawn, or two wills were drawn."

He said, "It is quite apparent to me now from our records that this man's will was drawn twice or was drawn and for some reason redrawn." The inference Mr. Bourne drew from the fact that the charge in February was but \$5 is that the will was probably re-written or some correction made in the previous document and re-executed. It is, I think, absolutely improbable that a will drawn twice by a man of the high standing of Mr. Bourne should not have been properly executed and attested.

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The matter, however, does not rest on any probability. Cyr, as I have stated, tells how on the first occasion the will was signed by the testator and attested by himself and Mr. Des Brisay in the room occupied by Mr. Bourne.

After the first will was executed, Pigeon and Cyr took it to Mr. James. On their way Pigeon fell in a sloppy street and soiled the envelope, and the envelope was in a soiled condition when handed to Mr. James at the bank for safe-keeping. Mr. James placed it in another envelope. He saw the will but remembered little or nothing of its contents. What he did recall was that an impression was left on his mind by Pigeon that Pigeon's nearest living relative was his sister, and that she was to get the whole of his estate after he died.

The testator was named in the will "Peter Pigeon," and by that name he appears to have been commonly called. He uses it not only in the will of November but also in the signature which he filed with the Bank of Montreal. A few months later he discovered that his baptismal name was Alexandre Zotique. From the evidence of his sister it appears that, he having notified her through Cyr or in some other way that he had made the will, she procured and forwarded to him his baptismal certificate setting forth his proper name. Cyr says that this letter was a month or so after the first letter, and that then he and Cyr went back and had the will redrawn, the only change being in the correction of the name of the testator. In the meantime they had procured the first will at the bank. There is no direct evidence that the second will was executed as the first undoubtedly was. In the exceedingly remote possibility that it was not properly executed, the first will stands. The new will was then taken to the bank and deposited with Mr. James as the first will had been.

On the 2nd March, 1924, after their return to Dewdney, Pigeon caused Cyr to write a letter to Mrs. Lefebvre at Williamstown, Ontario, where she resided at the time. It is affectionate and absolutely explicit as to the disposition he had made of his estate. It is in French, but a translation made by Cyr is in evidence, and when compared with the original, as I have taken the trouble to

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do, it appears to be correct. It begins: "Very dear sister,—A few lines in answer to your letter of the 28th."

I pause here to point out that "the 28th" cannot be the 28th of February, because a letter written on the 28th of that month could not possibly have reached Dewdney in two days, even if mailed on the day on which it was written; so that "the 28th" was the 28th *January*. The letter was probably that which enclosed the baptismal certificate and induced the correction made in the new will on the 21st February.

The letter proceeds: "I am always in good health and my papers, my testament, I went to see my lawyer last month and I changed my testament. He made a new one. After my death I give everything to Marie Felicité Lefebvre, wife of Joseph Lefebvre of Williamstown, Ontario, and my name is Alexandre Zoti- que Pigeon, known under the name of Peter Pigeon, and I have appointed as executors my sister, Marie Felicité Lefebvre, the wife of Joseph Lefebvre, and the said Joseph Lefebvre, both of Williams- town, Ontario, and Zoel Cyr of Dewdney, British Columbia. . . . I leave my testament at the same place at the bank where they already got it. My lawyer told me to leave it there. No one may lay their hands on my testament during my life."

Other parts of the letter are immaterial. Cyr deposed that he wrote the letter "just exactly as Pigeon told it as near as possible." He made no changes or suggestion.

The evidence thus far establishes clearly that the wills were made with care on the part of Mr. Bourne, deliberation on the part of Pigeon, and with the firm intention that his nearest living relative, the proponent in this case, should have the whole of his property at his death. I regard the due execution and attestation of the will as satisfactorily proved. As to the contents of the will there can be no possible doubt.

In August, 1924, Pigeon came east and lived for a time with his sister and her husband at Williamstown.

The Pigeon family had consisted of four brothers and two sisters. All were dead except Mrs. Lefebvre. The other sister, Martine, married and was the mother of Henri and William Major, the defendants in these proceedings. Two of the brothers are supposed to have left children, but at the time of the trial no trace had been obtained of these children, and the Majors were appointed to represent them. Pigeon was aware that Martine and his brothers were dead.

Pigeon remained at his sister's until the spring of 1925, when he became ill and entered the hospital at Alexandria. He returned to the Lefebvre home in April, and about the end of that month

left again for Alexandria, where he bought a small property. His relations with his sister were most harmonious according to the only evidence available.

On the 3rd May, 1925, Pigeon caused a letter to be written to the Bank of Montreal at Vancouver in which he asked to have his testament (the word he always used to signify will) sent to him at Alexandria. In the same letter appear the following words: "Any paper that comes to the name Mr. Lefebvre and Peter Pigeon do not give any money. Any papers that come to the bank except Peter Pigeon alone, no other name is no good."

I am unable to appreciate that any inference that Pigeon had quarrelled with his sister and her husband can be based on this letter, though Mr. Davis has put that forward as an argument. "Mr." Lefebvre had been named as an executor in the will, and it is possible Pigeon imagined that that would give Lefebvre power to draw on the deposit in the bank, which was comparatively small, the proceeds of the sale having been converted on the advice of Mr. James into Ontario provincial bonds.

The will was sent forward as requested and was received by Pigeon at Alexandria on the 21st May. The bank was written to on a date not fixed, but probably about the same time, by Mr. Osias Sauvé, a solicitor of Alexandria, who asked that the bonds be forwarded to him. The bank requested a proper order signed by Peter Pigeon, and, on receipt of that, having checked Pigeon's signature carefully with the standard on file at the bank, Mr. James forwarded the bonds to Mr. Sauvé and received his acknowledgment as well as Pigeon's own receipt. The savings account was also transferred to a bank at Alexandria.

Mrs. Lefebvre went to live at Alexandria, where one of her sons was in business, in November, 1925, and visited her brother and was visited by him until about the 14th or 16th May, 1925. She states that she was on good terms with the deceased throughout this time. She heard of his death, she says, on the 28th May. He was at the time more than 70 years of age.

A hardware clerk named Lalonde saw Pigeon frequently and did some writing for him to Cyr and possibly to others. In April, 1925, during an interview, Lalonde was "kidding," or talking in a jocular way, with Pigeon about his money. He was evidently known to be well to do for a man in his station of life. Lalonde asked him, "Why don't you give me that," referring to his fortune, and Pigeon said that all his money had been willed over to his sister. Lalonde further deposed that Pigeon did not appear to like one of the Lefebvre boys who was doing business at Alexandria.

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Another friend of the deceased was Louis Pelletier, a contractor, living in Ottawa, who had spent many years in Western Canada. Whenever Pelletier was in Alexandria he called on the old man, as he liked to talk about the west. His last visit was about the 1st May, 1926. While having a talk on that occasion, Pigeon said to him, "I do not have to work any more, I have money to live on the interest;" and "then I told him"—Pelletier does not speak very good English—"What are you going to do with that money," and he says: 'I got my affairs fixed up if I die. I have only one sister living,' me (Pelletier) I don't know Mrs. Lefebvre was living in Alexandria. I don't know whether she was dead. He told if he died, if anything happened to him, all his paper was made."

There was an objection here by Mr. Costello to the admission of the evidence and as to similar evidence on the part of Lalonde, and after his Honour had said that the objection was preserved the witness continued. "He said he had only one sister living and if anything happened"—then his Honour: "Everything went to her."

Mr. Davis objected very strenuously to this observation of his Honour as supplementing the evidence of the witness. It is to be remembered, however, that the will leaving everything to Mrs. Lefebvre had been embodied in the letter to her written by Cyr after the second will had been made and that Lalonde's evidence had been heard. Then the record proceeds:—

"Witness: I do not know her, I know the name, that is all."

"His Honour: Did he say he had his affairs arranged or settled?"

The witness had already so sworn, and there is no suggestion in his Honour's question as to how the affairs had been settled. Pelletier's answer made the matter clear. He deposed that Pigeon said, "All my papers are fixed up so that if anything happened to me I have only one sister; everything goes to her." Pelletier's testimony, like Lalonde's, was unshaken on cross-examination.

It appears that Pigeon had been dead quite a number of days before his death was discovered on the 28th or 29th May. Corruption had long set in, and the only persons who ventured to enter the house were the undertaker and two of Mrs. Lefebvre's sons. The undertaker was not called, but the sons gave evidence that by his direction, and having been warned of precautions that they should take, including the covering of their hands with mitts, they burnt the clothing, bedding, and some other property of the deceased, immediately after the funeral.

Later one of the sons searched the house and found papers scattered here and there but was unable to find a will.

It is argued that declarations by a person in regard to the disposition of his estate are to be regarded at times at least with doubt, and observations made in *Colvin v. Fraser*, 2 Hagg. Ecc. 266, are mainly relied on in support of this contention. That case, however, as the King's Advocate says, is *sui generis*. The question was as to the particular facts as found. They were so numerous and complicated that no less than 25 pages of the report of Sir John Nicholl's judgment are occupied by review of them before the law applicable is attempted to be stated. A proper appreciation of them cannot be fully formed without a perusal of the judgment of the learned Principal of the Court of Arches. For my present purpose a rough outline may suffice.

The deceased, John Farquhar, died in London during the night of the 5th and 6th July, 1826. He was about 76 years of age, a bachelor, and left an estate of over half a million pounds. Several nephews and nieces were his nearest relatives. One of these, John Farquhar Fraser, believing that his uncle died intestate, applied for and obtained administration of the personal estate; but on receipt from India, some months later, by a friend of the testator, one David Colvin, of a copy of a will and codicil made on the 7th March, 1814, and duly authenticated, a decree was issued calling on Mr. Fraser to bring in the letters of administration and shew cause why the same should not be revoked and probate of the will and codicil be granted to David Colvin, the surviving executor.

At the age of 19 Farquhar had gone from Scotland to India, where he remained about 45 years, maintaining no direct intercourse with his relatives in the last 25 years, but communicating regarding them with a friend, George Wilson, K.C., of London. When about to undertake the long and perilous voyage home, he decided to make his will, as was customary in such a case with persons of fortune. Accordingly he dictated a will and codicil to Alexander Colvin, a brother of David, and had a duplicate copy made by the same hand. Both parts were executed and attested and both were left in India. Two years later, doubtless at the testator's request, a sealed package endorsed "the will of John Farquhar, Esq." arrived in England and was delivered to him. Soon after reaching England, Farquhar sought to increase the large fortune acquired in India by his enterprise and frugality, by engaging in business. He became a partner in Whitehead's great brewery and in an Indian agency house. He also lent considerable sums on mortgage, and made several successive important

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investments in real property, the first in 1818, in what was called the "East Mark" estate.

In a conversation with his solicitor, one Drake, at the time of this purchase, Farquhar was "distinctly apprised" that an after-purchased estate would not pass under the will made in India but would devolve on the heir-at-law. No steps were taken upon that information until 1821, when Farquhar was about to proceed to Paris. On the morning of the 2nd October, at David Colvin's house, while the carriage was at the door, Farquhar produced before Colvin his copy or duplicate of the Indian will, made alterations in it, wrote another instrument, afterward spoken of by Colvin and one of the attesting witnesses as a will, disposed of the East Mark estate and some other real property, and appointed new executors. Neither the extent of the alterations nor the contents of the new will could be ascertained.

The transaction hastily completed, Farquhar set off for Paris, leaving a testamentary document with Colvin, who set about preparing a consolidation of the altered will and the other will or codicil. After consultation with one Drake, who usually acted as Farquhar's solicitor, a draft will was forwarded by Colvin to the testator at Paris. In this document many alterations in the will made in India appeared; all the annuitants, his relatives, were omitted, all his friends, all his executors in India.

These alterations were regarded by the Court as important in view of the effort made to set up the Indian will, and when the learned Principal had to consider the probability or improbability in point of fact that the deceased should have himself destroyed that instrument.

On returning from France in January, 1822, Farquhar took umbrage at an observation made by Colvin, and, in the presence of Mr. Bazett, one of his partners in the Indian agency, he tore up and threw into the fire the instrument of October, 1821, saying, "You may tell your friend David what he has lost."

Towards the end of 1822 Farquhar purchased the historic Fonthill Abbey estate for £300,000. He became reconciled with Colvin; material changes also took place in his relations with his nephews and nieces, and in other circumstances rendering the will made in India inapplicable.

As he was supposed to have intentions to favour educational institutions both in his native land and in London, he was importuned frequently to contribute moneys to various projects and make a will; while he, as the judgment states, "for different reasons would wish to evade or get rid of the subject." The observations made in the judgment, as to the caution proper to be

exercised in considering evidence of declarations attributed to a testator, have reference to the facts and inferences of the particular case before the Court; they recognise that such a destruction or revocation of one of the duplicates of the Indian will as took place either in October, 1821, or January, 1822, is a revocation of the other part, and that the evidence failed to rebut the presumption that the many changed circumstances in the quality of Farquhar's estate and in his relations with his nephews and nieces rendered it probable that, notwithstanding certain statements which he made to the contrary, the presumption remained that his last will, whichever it was, had been destroyed, as had one or more previous wills, *animo revocandi*.

In *Saunders v. Saunders*, a case in the Prerogative Court of Canterbury (1848), 6 N.C. 518, a duplicate of a will retained in the possession of the testatrix was not to be found at the time of her death, 9 months after the will was made. The presumption of law that it was destroyed *animo revocandi* was held to be rebutted by circumstances. Such circumstances were that, as in the present case, the will was prepared with great care and deliberation; another, not greatly dissimilar to what happened in this case, that the will was executed in duplicate; and the third that, as here, the deceased adhered to the will to a late period in life.

In *In Bonis Pechell* (1860), 6 Jur. N.S. 406, probate was decreed of a copy of a will of the testator, an officer in the 85th Regiment, who had left his will with a solicitor who died, but among whose effects the will was not found.

Sugden v. Lord St. Leonards, 1 P.D. 154, is of course the classical case on lost wills. The principal question in that famous case was whether the *contents* of the will had been established. It is quite true that both the judgment of the President of the Probate Division and that of their Lordships of the Court of Appeal have gone to the utmost limit in regard to establishing the contents of a lost will.

Nothing more than mere doubt on that point was expressed in *Woodward v. Goulstone*, in the House of Lords (1886), 11 App. Cas. 469. Although Butt, J., at the trial (*Goulstone v. Woodward* (1884), 1 Times L.R. 12, decided that the will of the testator had not been revoked, he says he reached that conclusion "not without hesitation." In the Court of Appeal (1885), 1 Times L.R. 591, Lord Justice Lindley said: "The Court was asked to grant probate of a will which no living man had ever seen, and of which no living man had ever seen even a copy or a draft." He asked himself, "whether a will was made in 1878." He answered, "Yes." "Was that will revoked?" To this he

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answered "No." Then he asked, "What were the contents?" It is on this last question that the decision of the Court is based. While Peters's evidence was regarded as unshaken, doubts arose as to the accuracy of his recollection, and the Court thought it sufficient to say that the contents of the alleged will had not been established. Nothing more was determined. The appeal to the House of Lords (1886), 11 App. Cas. 469, decided no more; and the decision is reported solely for the opinions expressed by several distinguished jurists, Lord Chancellor Herschell, Lord Blackburn, and Lord Fitzgerald, on the *Sugden* case.

The Lord Chancellor said that the case was "very different" from the *Sugden* case, "upon which," he said, "I do not mean to cast the slightest doubt" (p. 478). Lord Blackburn said that he wished to guard himself against being supposed, except in so far as it was necessary for the determination of the case before the Court, "to be either affirming or dis-affirming the decision which was come to in *Sugden v. Lord St. Leonards* or the propositions of law there laid down. I wish to leave them just in the same way as before as far as I am concerned." Lord Fitzgerald said (p. 485) that he was willing to follow the great Judges who decided the *Sugden* case "in the conclusions to which they eventually arrived," but that he was not disposed to go one hair's breadth beyond. He thought that case might be truly said to have reached the very verge of the law, and it ought not to be extended. It is to be remembered that what was before the Court in *Woodward v. Goulstone* was: What were the contents of the last will?

A more recent comment on the *Sugden* case is contained in the judgment of this Court, differently constituted, in *Re Perry*, 56 O.L.R. 278, as expressed in the opinion written by Middleton, J.A. There the decision was based on the conclusion that the substance, the contents, of the lost will, had not been clearly and convincingly proved. No other question was dealt with in the judgment.

While emphasising the criticism made in *Woodward v. Goulstone* of the decision in *Sugden v. Lord St. Leonards*, *quoad* proof of the contents of a will, Mr. Justice Middleton observed (p. 283) :—

"The real conclusion of the case was that, once satisfied as to the accuracy of the testamentary intention, as to the honesty of the witness, and the ability of the witness really to give the substance of the will, the Court ought to act upon the evidence. To refuse to do so would be to defeat the ends of justice."

The ends of justice would, in my opinion, be defeated in the present case if the Court were to find that the substance and execution of Pigeon's will had not been established by full and stringent proof.

Atkinson v. Morris, [1897] P. 40, is not a case in point. It simply decides that declarations made by a testator after the date of an alleged will to prove the execution of a will are not admissible to prove execution; and that, while there was evidence that the testatrix intended to destroy her will, she had not done so with the formalities prescribed by sec. 20 of the Imperial Wills Act, which is almost identical with sec. 22 of the Ontario Wills Act, R.S.O. 1927, ch. 149. I had to consider the same point in *Bell v. Matthewman*, 48 O.L.R. 364.

The precise points involved in the present appeal were before the Ontario Court of Appeal in *Stewart v. Walker*, 6 O.L.R. 495. I quote from the judgment of the late Sir Charles Moss, C.J.O. (p. 498) :—

"The paper not being produced, the questions are: (1) have its contents been proved and established with sufficient certainty; and (2) was it revoked or destroyed by the testator *animo revocandi* or *animo cancellandi*, or is it to be deemed as still in existence as a valid and subsisting will, lost, mislaid or destroyed by accident or otherwise, without intention on the part of the testator to put an end to it as a testamentary paper?"

On the question of contents the learned Chief Justice observed (p. 503) :—

"While the decision in *Sugden v. Lord St. Leonards*, 1 P.D. 154, stands, it must be accepted as the law that declarations subsequent to the making of a will are admissible as secondary evidence of its contents."

The learned Chief Justice then said, referring to *Woodward v. Goulstone*, that the Law Lords expressly disclaimed any intention of dissenting from the judgment of the majority of the Court in *Sugden v. Lord St. Leonards*; and, referring to *Atkinson v. Morris*, he observed that, although references were made in it to the *Sugden* case, they were not made with a view to questioning it, "but in order to point out that it had no bearing on the question in hand, which was an entirely different one;" and that Lord Russell of Killowen, C.J., said in that case that "if it were necessary for the Court to consider the point which was dealt with in *Sugden v. Lord St. Leonards* they would be bound by the decision upon it."

Applying the law as so established, the Court held, as had MacMahon, J., at the trial, that the contents of the lost will had

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been proved with sufficient certainty, and passed on to the question whether the will had been destroyed by the testator *animo revocandi*, or, in other words, whether, being lost, the ordinary presumption had been rebutted.

The considerations which led to the answering of the latter question in the affirmative have a striking analogy to those which lead me to think that the presumption has been rebutted in this case.

McLaren (the testator in *Stewart v. Walker*) made only one will. At least there was nothing to lead to the conclusion that he ever made another. His relations with his principal beneficiary were confidential, affectionate, and continued until he was stricken with his last illness. None of his other reputed relatives stood as high in his esteem. The large bequest to Mr. Stewart was a natural and dutiful disposition of the greater part of his estate. No reason existed for a change in his will, or for its destruction with a view to making a different disposition. If he revoked the will and died intestate, Mr. Stewart and his other legatees would be deprived of the benefits granted by the will, and they would pass to the Crown. There was, in addition, the possibility that the will had been destroyed when the valise in which he was supposed to have kept it was broken open after his death.

Such in brief were the considerations which led a very strong Court, Moss, C.J.O., Osler, J.A., Maclennan, J.A., and Garrow, J.A., to conclude that the presumption of destruction of his will by the testator *animo revocandi* had been rebutted.

Allan v. Morrison, [1900] A.C. 604, a New Zealand appeal, is, like *Colvin v. Fraser*, relied on by Mr. Davis as affording support to his contention that the ordinary presumption has not been rebutted in this case.

After the most careful consideration that I have been able to give to the several judgments of the trial Judge, the Court of Appeal (1899), 7 N.Z.L.R. 678, and the Judicial Committee, and with the utmost respect for my learned brothers who differ from me, I am of opinion that the facts clearly distinguish *Allan v. Morrison* from the case at bar.

There was a strong probability that Morrison himself had destroyed the will of 1893 endeavoured to be set up, and that he had intended to make another and might have done so if death had not intervened.

There had been many changes in Morrison's personal condition and in the value of his property. In addition, he had destroyed one will by burning it, and had remained intestate for eight months before making the will of 1893. That will was in

the testator's custody some time shortly before his death in 1897, and was traced to no other custody. He was subject to a disease which prevented the full co-ordination of his limbs. After the making of the will, he became unable to write, and had to be fed. Onerous and disagreeable attendances on him became necessary and were performed by the step-daughters of a widow whom he had married in 1884. Their claims had been pressed upon his attention and he had acknowledged them. After the will was made, his estate had increased in value one-third, or about £3,000; one of his legatees had died, and there was a suggestion that he was dissatisfied with one of his trustees and intended altering his will. He had also discussed with a friend the result of an intestacy. It was assumed by both sides that the will was in existence until his last illness. Towards the end of January, 1897, when he had been left alone in the house, except for the presence of a servant-girl, he gave her his keys and had her open an iron safe containing a locked tin box in which he was supposed to keep his will. He then directed her to leave the room, in which a fire was burning. He was himself able to unlock and lock the tin box. After an interval he called her back and she closed the safe. Later on the same day he became unwell and a doctor was sent for. He was able to rise from bed the next day but was very ill on the 23rd, and sent for his doctor, *lawyer*, and clergyman. The lawyer was absent and was unable to call until the 25th, but Morrison said he was not ready for him. The testator's purpose in calling in his lawyer is not stated; but it can, I think, be referable only to the making of a will to take the place of the will which Morrison had destroyed a few days previously. He rallied on the 26th and was able to play cards in the evening. He was up on the following day, but retired early and was never afterwards out of bed. On the 2nd February, he became unconscious and so remained until his death on the 5th. The envelope which had contained his will was open and the will missing.

On the facts established the trial Judge rejected as unreasonable the hypothesis of the accidental destruction of the will, and said that he was not convinced that the will had not been destroyed by the testator *animo cancellandi*. The Court of Appeal declared that there was a reasonable possibility that the testator had himself destroyed the will, and that the ordinary presumption had not been displaced. There were thus two concurrent judgments on what their Lordships of the Judicial Committee regarded "as after all a question of fact which it is not the practice of the Board to review" and advised the dismissal of the appeal. The decision lays down no novel principle of law, and

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is to be considered, as every case should be, with regard to the particular facts disclosed in it, which, like those in *Colvin v. Fraser*, differ in all material aspects from the facts of the present case.

Certain observations made by Lord Merrivale in the recent case of *Barkwell v. Barkwell*, [1928] P. 91, seem to me worthy of repetition. In that case the testator had made and revoked several wills, and no effort was made to rebut the presumption that his last will had been revoked. The learned President of the Probate Division said (p. 97) :—

“To exclude a subsequent statement of a testator as to the fact of execution of a will is one thing. To exclude, or to admit his statements as to the contents is another. It may be that the observance of this distinction will some day help in the decision of the vexed question what statements of the testator can be given in proof.”

Commenting on what statements of a testator are admissible to establish testamentary disposition, the learned President of the Probate Division said (pp. 96 and 97) that the question stood where it was left by Lord Herschell in *Woodward v. Goulstone* upon consideration of a judgment in relation to the *Sugden* case, “that is to say, it remains a doubtful and difficult one. . . . The Court of Appeal in *Sugden v. Lord St. Leonards* held that certain statements made by the testator in that case after the execution of a will were admissible, and as matters stand—notwithstanding the doubts expressed in *Woodward v. Goulstone*—the judgment in *Sugden v. Lord St. Leonards* must be regarded as having declared the law so far as it has been authoritatively declared.”

The principles deducible from this decision are based on well-established law, that is, declarations of a testator made after execution of a will are not admissible to establish the fact of execution (because that would be in contravention of the Wills Act), but are admissible to prove the contents of a will otherwise shewn to have been properly executed and no longer in existence.

All the circumstances of the present case seem to me to be consistent only with the existence of Pigeon’s will up to the time of his death, and inconsistent with the contention that he himself destroyed it with the intention of revoking it.

In my opinion, such an intention cannot be inferred from the facts, while the contrary is deducible.

The testator made his will in the first instance with care and deliberation. On learning from his sister that the name he ordinarily went by was not his baptismal name, he had the will re-

drawn. In both cases a solicitor of high standing was employed. The evidence of Cyr establishes positively that the first will was properly executed. It seems to me beyond any reasonable probability or possibility that the second will also was not properly executed and attested. If it were not, the first must stand. In the second will no change whatever was made in the disposition of the testator's estate. The contents of the will are absolutely proved. All his property was devised to his nearest relative, his sister, Mrs. Lefebvre, with whom he was in correspondence through Cyr. He had that will sent to him at Alexandria by the banker with whom he had deposited it in Vancouver. He told Lalonde and he told Pelletier, the last conversation within a few weeks of his death, that his will was as it was represented to be in the letter which Cyr wrote to Pigeon's sister soon after the correction was made by the second will. There was no material change at any time after the making of the will in the quality of the testator's estate. He continued on friendly terms with his sister; and that he desired to live alone when he returned to the east, as he had lived in the west, implies no antagonism to Mrs. Lefebvre. There is not the slightest suggestion of any reason why he should destroy his will. No evidence was given of a previous destruction nor to suggest any cause for destroying his will with the intention of revocation, such as undoubtedly was given in *Colvin v. Fraser*, *Allan v. Morrison*, and similar cases. There was here, in addition, as in *Stewart v. Walker*, the probability or possibility of the destruction of the will when so many of Pigeon's effects were burned after his death.

Where nothing has happened to render it probable that a testator has grounds for revoking a will of proved execution and substance, made with care and deliberation in favour of his only nearest of kin, with whom friendly and affectionate relations have been continuous, and he has never made any different disposition of his estate, or revoked or lawfully cancelled or destroyed a previous will or wills; and, shortly before his death, has not only manifested no intention of making another will but has declared that his will—last traced to his possession—is still existent, especially where there is a probability or possibility of its accidental destruction, the Court will, upon such considerations, regard the presumption that a will has been destroyed by a sane testator *animo revocandi* as rebutted. In such a case the presumption may be destroyed by slight evidence, as it was thought by great jurists to have been destroyed in *Sugden v. Lord St. Leonards* and *Stewart v. Walker*.

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I cannot imagine a case in which less evidence would be required to prove that a testator had not destroyed his will, or to rebut the presumption of destruction *animo revocandi*, than in this; and, on consideration of the facts and the law which I think applicable, I am humbly of opinion that the learned Surrogate Court Judge was right. I would accordingly dismiss the appeal with costs.

ORDE, J.A.:—The execution of the will in question and the nature of its contents were so clearly and satisfactorily proven that it is unnecessary to review the evidence upon which the learned Surrogate Court Judge came to that conclusion.

That the deceased had executed a valid will by which his whole estate would go to his only sister, and that that will was in existence and in the deceased's possession on the 21st May, 1925 (the date of the receipt sent by him from Alexandria to the bank in Vancouver), may be taken as abundantly established.

The sole question which, in my opinion, gives any trouble is whether or not the presumption of revocation arising from the fact that the will cannot be found may be deemed to be rebutted by the history of events subsequent to the 21st May, 1925, and the circumstances surrounding the deceased's latter days and his death.

Upon that question there is, so far as I know, but one principle of law applicable, namely, that when a will known to exist and to be in the testator's possession cannot be found after his death and there is no proof that it left his possession before his death or that it passed into some person's hands after his death, it is presumed that the testator destroyed it *animo revocandi*. That presumption may be rebutted, but what particular circumstance may or may not constitute, in the mind of the Court, sufficient evidence to rebut the presumption, is solely a question of fact. For this reason, cases in which the particular facts have been held to be either sufficient or insufficient for the purpose really afford little help because they are merely applications of the principle and no more.

What are the circumstances here? Pigeon, an elderly man with little or no education, having made what to him was a fortune in British Columbia, without wife or children, made his will leaving his whole estate to his only nearest of kin, his sister. Not long afterwards, he came east to his old home, and, after staying for some time with his sister, he acquired a small home in Alexandria, where he lived until his death some days before

the 29th May, 1928, the date on which he was found dead in his house.

Shortly after his move to Alexandria, he wrote the bank in Vancouver where he had left his will and asked that it be sent him, and the parcel containing it was mailed to him by registered letter, and on the 21st May, 1925, he signed and returned to the bank a receipt for "one sealed envelope said to contain last will and testament."

If the story stopped there, the presumption of revocation from the failure to find the will would be so strong as to be substantially conclusive. There is no suggestion that Pigeon was of unsound mind or was incapable of changing his mind and of revoking his will by destroying it. And, without more, no suggestion that any such action on his part was unlikely or inexplicable would be of much avail when set against the fact that the will was not forthcoming.

But there are circumstances here which lead me to the irresistible conclusion that Pigeon did not destroy the will, and in considering those circumstances the unlikelihood of his having done so is in my opinion an important factor.

That he was fond of his only sister is plain from the affectionate letter he wrote her from Dewdney, B.C., in March 1924, telling her that by his will he had left everything to her. There is no evidence that anything had happened to change his regard for her. It is suggested that his move to Alexandria after his short stay with his sister at Williamstown and the contents of the letter to the bank in May, 1925, when he sent for the will, indicated some sort of quarrel with her. But there is nothing in the letter to justify that suggestion. The mention of "Mr. Lefebvre" in that letter, and the direction "don't give any money—any parties that come to the bank except Peter Pigeon alone no other name is no good"—would indicate some fear that "Mr. Lefebvre" might attempt to get Pigeon's money on deposit in the bank at Vancouver. Pigeon's sister was the wife of Joseph Lefebvre, and he may have had some fear that Lefebvre had designs on his money, but I can see no reason for supposing that because of that Pigeon's affection for his sister had altered. That there was no break with his sister is evident from the fact that she at a later date moved to Alexandria and that the deceased and she constantly visited each other and were on good terms.

Then there is the evidence that within four or five weeks of his death Pigeon had said that everything was to go to his sister.

It was argued that, even assuming the existence of the will up to the time just mentioned, that is, a few weeks before his

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death, the testator might well have later changed his mind and destroyed it. And, if there were nothing more and no evidence to account for the failure to find it, this argument would be a cogent one, though it cannot be that one must in every case trace the existence of a will down to a point so close to the testator's death as to remove all physical possibility of its destruction by him.

Some point was made of the tendency of a certain type of testator to mislead others as to his true intentions. Is such a suggestion reasonable here? No evidence was adduced to lead to the conclusion that he had altered his intention to benefit his sister. He had told her that everything would go to her by his will. Why not assume that in telling this to others he was quite open and frank rather than that he intended to deceive?

Having regard to the man's age and lack of education and the evident desire to settle the question as to the destiny of his estate upon his death, the statements made by him shortly before his death strongly rebut any presumption that up till then he had deliberately destroyed his will. Till then nothing had happened to make it likely that he would change his testamentary intentions. Did anything happen during the few weeks that intervened before his death? There is no evidence of anything.

With all this evidence to lead to the conclusion that the will was in existence shortly before his death, how account for its loss? Any difficulty in that respect is, I think, clearly removed by the evidence as to the destruction of the bedding, clothing, etc., owing to their condition when the testator's body was found in a state of decomposition several days after his death.

The whole story from the date of the making of the will down to the last episode just mentioned establishes conclusively to my mind the valid execution of a will leaving the whole estate to his sister, its continued existence down to within a few weeks of the testator's death, no reason thereafter for its revocation, and circumstances to account for the failure to find it after his death. Dealing with the question of revocation purely as a question of fact, I think any presumption of revocation is fully and satisfactorily rebutted by the particular circumstances of this case.

The appeal should be dismissed.

Appeal allowed (LATCHFORD, C.J., and ORDE, J.A., dissenting).

[APPELLATE DIVISION.]

STADDER v. CANADIAN BANK OF COMMERCE.

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Husband and Wife—Deposit by Husband of Money in Bank to Joint Account—Mode of Conveniently Managing Husband's Affairs—Extent of Right of Wife Surviving—Presumption—Rebuttal—Authority to Bank to Pay to her—Moneys Paid to Public Trustee on her Behalf—Will of Husband—Life-estate to Widow with Power of Encroachment on Capital—Gift over of what Remained.

D. deposited a sum of money in a bank to the joint credit of himself and his wife, and they both signed a document authorising the bank to pay all moneys at the credit of the account to either of them, and in the case of the death of either to pay the same to the survivor. After D.'s death, his widow became insane and was confined in a public hospital for the insane:—

Held, that the money then standing to the credit of the account was properly paid by the bank to the Public Trustee, who stood in her shoes.

Having been restored to sanity and discharged from the hospital, the widow redeposited in the bank what was left of the money, to the joint credit of herself and two relatives:—

Held, upon the evidence, that the money originally deposited belonged to D. and was placed to the credit of himself and wife as a means of conveniently managing the affairs of himself and his family; and, therefore, the presumption in favour of the right of his wife to what remained of the fund on his death was rebutted.

Re Hodgson (1921), 50 O.L.R. 531, and other cases, followed.

The fund, therefore, formed part of the husband's estate and passed under his will, by which he gave to his wife the whole of his estate "for her sole use as long as she may live," and at her death, to nieces and nephews, "what shall then remain over of my estate":—

Held, that no more than a life-estate was given to D.'s widow, but the description "what shall then remain over of my estate" adequately implied a power on the part of the widow to encroach on the capital of the estate; and what remained after her encroachments passed at her death under the will to his nephews and nieces.

Re Johnson (1912), 27 O.L.R. 472, followed.

AN appeal by the plaintiff, the executor of William Downs, deceased, from the judgment of MEREDITH, C.J.C.P., dismissing an action to recover from the defendants Anguish and Reid, for the estate of the deceased, the sum of \$2,805.02 and interest deposited with the defendant bank by Downs to the joint credit of himself and his wife, and for an injunction restraining the defendant bank from paying over part of the moneys remaining on deposit or redeposited by the widow, who had since died, to the joint credit of herself and the defendants Anguish and Reid, who survived her.

The facts are fully set forth in the judgments, *infra*.

February 19. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

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R. S. Colter, K.C., for the appellant, argued that the original deposit of the moneys in the bank was not intended to be a provision for the wife, but simply a convenient mode of managing the husband's affairs, and therefore the money remained his property: *Smith v. Gosnell* (1918), 43 O.L.R. 123; *Daly v. Brown* (1907), 39 Can. S.C.R. 122; *Southby v. Southby* (1917), 40 O.L.R. 429; *Re Richer* (1919), 46 O.L.R. 367; *Re Johnson* (1912), 27 O.L.R. 472. As to the consequences flowing from the will of William Downs, the widow was entitled to use the property disposed of by the will so far as she should care to use it, and what remained on her death would go to the three beneficiaries named in the will.

S. E. Lindsay, K.C., for the defendant bank, respondent, said that the bank was willing to pay over the money to whomsoever the Court might direct.

W. D. M. Shorey, for the defendants Anguish and Reid, respondents, contended that the original deposit of the money in the bank in the names of husband and wife raised a presumption of an intention to create a joint tenancy with all its incidents, including the incident of beneficial ownership in the survivor. This presumption had not been rebutted: *Re Hodgson* (1921), 50 O.L.R. 531; *Mathews v. National Trust Co. Ltd.* (1925), 57 O.L.R. 657.

April 19. RIDDELL, J.A.:—This action is brought by the executor of the late William Downs, alleging that the defendant bank had at the time of the death of Downs some \$2,805 money of his; that, the widow having signed an acknowledgment that this was the money of her deceased husband, subject to her right to draw whatever she required for her own use, and a copy of this acknowledgment being sent to the bank, it, notwithstanding, handed the money over to the Public Trustee for her when she became insane and was in the Hospital for the Insane at Hamilton; that on recovering her sanity she redeposited part of this money in the bank to the joint credit of herself and her kinswomen Christina Anguish and Catherine Reid; that she died, and the bank refused to pay the money to the plaintiff for William Downs' estate. The bank, being willing to pay to those legally entitled, applied for an order of interpleader, but the plaintiff objected, and his objection prevailed. It is still willing to pay the parties entitled. The defendants Anguish and Reid claim the money as their own.

The sole reason suggested why an order of interpleader should not issue, and the sole reason for the objection of the plaintiff to its issue, is the claim that the bank "illegally" transferred the

money to the Public Trustee and thereby enabled the widow to deposit part of it under the joint names of herself, Anguish and Reid; consequently, it is argued, the bank is the *fons et origo mali*, the cause of the alleged wrong to the plaintiff and his testator. But this argument is based upon a fundamental error as to the legal relation of banker and customer. When one deposits money in a bank, he ceases to be the owner of it or of any interest in it; the bank is not trustee or agent of the customer in respect of the money so deposited; it may lend it, spend it, hide it in a napkin, bury it or throw it into the lake, and the customer has nothing to complain of. All that the bank owes to the customer is to have enough money to pay him when he calls for it, and to pay him in full and without delay. No one has any doubt as to these trite doctrines since *Foley v. Hill* (1848), 2 H.L.C. 28. *Joachimson v. Swiss Bank Corporation*, [1921] 3 K.B. 110, is not much more than a commentary on this; and the discussion there is as interesting as instructive.

In the pleadings, indeed, the full amount to credit in the bank at the time of the transfer to the Public Trustee is claimed, with interest; but it was admitted that the widow was entitled to the amount which was expended by and for her; consequently, there was no possible reason why an order of interpleader should not have been consented to by the plaintiff.

It was suggested that an injunction would or might be granted against the bank paying out the money to the two defendants—but that savours of absurdity when one remembers that it is the bank's own money which it is to be forbidden to pay out. The only possible ground for an injunction would be that the bank, on paying out this money, would not have enough left to pay the plaintiff, and it is not contended that it has got so low in funds as that.

As respects the bank, it should in any case be awarded its costs, including the costs of that application, to be paid by the plaintiff.

We come now to the real point of the case, i.e., who is entitled to the money in the bank? We first consider the original deposit and the reason for it. There are many cases in our own courts of deposit by the husband of his money in the bank in the names of himself and his wife, in which the right to the money after the death of the husband is considered; most of these will be found cited and partly quoted in 5 C.E.D. (Ont.) 653, 654, under the heading "Joint Tenancy." I do not think it necessary to quote from them, the result of them all being that the main question is, whether the document was intended to embody the rights of the

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husband and wife as between themselves or was a memorandum defining the rights and duties of the bank: *Re Hodgson*, 50 O.L.R. 531, at p. 534.

In the present case, we are not left in doubt, because one of the respondents herself gives satisfactory evidence on the point, thus:—

"Q. Now I want to bring to your attention the original deposit, Miss Anguish, that was made in the Bank of Hamilton; did you see Mr. and Mrs. Downs there at any time? A. I saw them in the bank one morning.

"Q. Were they just coming into the bank? A. Yes.

"Q. And were you going out? A. I was going out.

"Q. Is your memory clear on that point? A. Yes.

"Q. Will you please tell us what conversation took place then?

A. Well, you just mean in reference to the money?

"Q. I would like you to tell the whole—

"His Lordship: Only in reference to the money; do not tell what kind of weather it was.

"A. Well, he told me he came down that day with his wife to put the money in jointly, because he said he was getting old and was not able to always come down, and he thought she would be able to draw it. That was prior to when they went in."

And again:—

"Q. In the examination for discovery you say that you met them in the bank, and somebody told you: 'I am getting feeble and can't travel very much and I want to fix it so that she can draw out money for us.' Is that right? A. Well, I might have said that way, it must be that way.

"Q. That is what you understood them to say? A. Yes, that is what I understood them to say.

"Q. And Mrs. Downs was present with him at that time? A. Yes, she was present there at the time."

This shews that the transaction was not intended to be a provision for the wife, but simply a mode of conveniently managing the husband's affairs, and consequently the money was left his property: *Southby v. Southby*, 40 O.L.R. 429, at p. 435; Lush on Husband and Wife, 3rd ed., p. 211. In that case the provision that the wife might draw after the death of the husband is not a valid disposition of the remaining money, as it would violate the Wills Act.

The result is that the original deposit was the husband's money. In arriving at this conclusion, I pay no attention to the admission signed by the widow, as I think that under the circumstances it should not be used against her or those claiming under her.

It remains to consider the effect of the will of William Downs. It reads:—

"I give devise and bequeath to my wife Margaret Downs the whole of my estate both real and personal for her sole use as long as she may live and at her death I desire that what shall then remain of my estate shall be equally divided between the following share and share alike namely my nephew John Stadder of the township of Walpole my niece Christina Anguish of the said township of Walpole and my niece Mrs. Ruth Bone wife of Dr. James Bone of the village of Hagersville for their sole and only use forever."

Reading this in the light of all the circumstances, placing ourselves in the arm-chair of the testator, as the saying is, I can read this in no other sense than as giving to the widow this property so far as she should care to use it; and providing that if she should not care to use any of it the remaining portion should go to the three persons named in the will. Such a provision is wholly valid, and it should now be carried out.

There should be a declaration that the amount of the estate left at the death of the widow belongs to the estate of William Downs, to be administered according to the provisions of the will, with the logical results.

The bank should have its costs from the plaintiff (not to be charged against the estate), including the application for an order of interpleader. The plaintiff should have his costs of action against the defendants other than the bank throughout.

MASTEN, J.A.:—Appeal by the plaintiff, John Stadder, from the judgment pronounced at the trial by Meredith, C.J.C.P., dated the 6th November, 1928.

In this appeal the leading facts appear in the reasons for judgment prepared by my brother Riddell, and need not be here repeated at length.

With respect to the position of the bank, I note that the document exhibit 4, signed by the late William Downs and his wife Maggie Downs, dated the 30th June, 1920, contains among others the following provisions:—

"To the Bank of Hamilton.

"The undersigned hereby request you to open a joint account or accounts under the following title . . . William Downs and Maggie Downs . . . and the undersigned authorise you to pay all moneys at the credit of such account or accounts to the undersigned or either or any of them . . . and in case of the death of the undersigned or either or any of them to pay the

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same to the survivor or survivors or any one or more of them or upon the cheques of any one or more of them."

These words, which were undoubtedly inserted for the protection of the bank, clearly authorised it after the death of William Downs to pay to the surviving spouse Maggie Downs the amount then standing to the credit of this account, though that by no means determines the question now before us, viz., the ownership of the residue of the fund after the death of Maggie.

On the authority of the document of deposit, I have no doubt that, while Maggie Downs was in the Hospital for the Insane at Hamilton and the Public Trustee stood in her shoes, his request to the Bank of Hamilton to pay him the money standing to the credit of this account was properly acceded to by the bank. In fact the bank had no option but to comply with that request.

No valid reason has been pointed out to this Court why the bank was not entitled to the interpleader order for which it applied.

Coming then to the main issue, as to whether the residue of the fund redeposited and now standing in the bank to the joint credit of Maggie Downs, Catherine Reid and Christina Anguish, is payable to the two persons last named as surviving joint tenants after the death of Maggie Downs, or should be paid to the executor of William Downs as part of his estate: it is clear upon the evidence, first, that the money constituting the fund when it was originally deposited belonged to William Downs, and, secondly, that this money was transferred into an account in the names of William and Maggie Downs as a mode of conveniently managing the affairs of William Downs and his family. The law is clear that in these circumstances the presumption in favour of the right of Maggie Downs to the residue of the fund on the death of William Downs is rebutted.

I refer to the judgments of the Divisional Court in *Everly v. Dunkley* (1912), 27 O.L.R. 414. The decisions are discussed at length by Middleton, J.A., in *Re Hodgson*, 50 O.L.R. 531. The last case that I have found in which the principle was applied is *Re Potter* (1926), 29 O.W.N. 327.

The fund therefore formed part of the husband's estate and passed under his will. Then what is the effect of the will. The will gives to the wife "the whole of my estate both real and personal for her sole use as long as she may live," and at her death makes a gift over to nieces and nephews of "what shall then remain over of my estate." The intention of the testator is clear. No more than a life-estate was ever given to Maggie Downs, but the description contained in the direction respecting the remainder,

viz., "what shall then remain over of my estate," adequately implied a power on the part of Maggie Downs to encroach on the capital of the estate, and the residue as now ascertained passes under the will of William Downs to the nephews and nieces named by him in his will.

The case, in my opinion, falls within the principle of *Re Johnson*, 27 O.L.R. 472, and cases following it, of which the last is *Re Richardson* (1928), 35 O.W.N. 81, and is not within the field covered by such cases as *Re Walker* (1925), 56 O.L.R. 517; *Re Scott* (1925), 58 O.L.R. 138; and *Re Jones* (1927), 60 O.L.R. 136.

For these reasons I concur in the order proposed by my brother Riddell.

LATCHFORD, C.J., and ORDE and FISHER, J.J.A., agreed with MASTEN, J.A.

Judgment as stated by RIDDELL, J.A.

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Landlord and Tenant — Lease of Theatre-buildings — Agreement of Lessees with Company for Operation of Theatres—Whether Sublease or mere Licence—No Exclusive Right of Occupation Provided for—"Rent"—"Exclusive Management"—Notice of Forfeiture —Time.

The defendants, the lessees from the plaintiffs of two theatre-buildings, entered into an agreement with the P. company for the operation by it of the theatres. The agreement contained no words of demise or grant, no provision for exclusive occupation, and did not purport to confer upon the P. company any estate or interest in the land upon which the buildings stood:

Held, notwithstanding the use of the word "rent" in the agreement and notwithstanding that it provided for exclusive management by the P. company, that the agreement was not to be regarded as a lease, but merely as a licence; and the plaintiffs were not entitled to forfeit the lease to the defendants for breach of the covenant therein contained not to assign or sublet without leave.

To be a lease, a document must confer a right of exclusive occupation. *Glenwood Lumber Co. v. Phillips*, [1904] A.C. 405, *Chaplin v. Smith*, [1926] 1 K.B. 198, and other cases, followed.

The plaintiffs' notice of forfeiture for breach of the covenant was held sufficient in point of time.

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THE first action was commenced by writ issued the 16th February, 1928, in which the plaintiffs, the Corporation of the Town of Brockville, claimed (a) an injunction restraining the defendants from permitting Paramount Theatres Limited, or any other person or corporation, to operate the New Theatre; (b) damages for breach of covenant to maintain and operate the said theatre in a proper manner; (c) damages for breach of covenant to repair; (d) damages for breach of covenant not to assign or sublet.

In the second action the plaintiffs' claim was for an injunction restraining the defendants from operating the New Theatre or from controlling or intermeddling with the management of the theatre and for other relief.

The third action was for a declaration that the lease of the New Theatre had been forfeited for breach of covenants; (b) possession; (c) an account; (d) double rental since service of certain notices; and other relief.

November 6, 1928. The three actions were tried together before LOGIE, J., without a jury, at Brockville.

H. J. F. Stewart, for the plaintiffs.

A. C. McMaster, K.C., and *L. V. Fitzpatrick*, for the defendants.

November 14, LOGIE, J.:—In 1910 the plaintiffs, by an indenture made in pursuance of the Act respecting Short Forms of Leases, demised and leased the building in Brockville known as the New Theatre and the premises therein described to the Brockville Opera House Company Limited for a term of years, with a provision for renewal at a fixed rental, and without payment by the lessee of municipal taxes or municipal licence fee. The New Theatre was operated by the lessee, or by others to whom the lease had been assigned with consent and approval of the plaintiffs, until about the 27th April, 1921, when the lessee, with the consent and approval of the plaintiffs expressed in by-law No. B.1287, assigned the lease and the residue of the term thereby created to one Laing and the defendant Ritchie. Dobbie was interested *ab initio*, but, being Mayor of Brockville at the time, concealed his interest.

On or about the 27th August, 1923, the defendants Dobbie and Ritchie and the said Laing entered into an agreement with the defendant Paramount Theatres Limited for the operation for a period of one year of the said New Theatre, whereby the defendant Paramount Theatres Limited became entitled to the exclusive

management of the New Theatre, together with a moving picture theatre known as Brock Theatre, and was to operate the same at a "rental" of \$200 per month for the New Theatre and half the profits of the joint operation of the New Theatre and the Brock Theatre, for a period of one year.

In April, 1924, the defendants Dobbie and Ritchie and the said Laing entered into a second agreement with the defendant Paramount Theatres Limited for the operation for a further period of four years expiring on the 4th September, 1928, of the said New Theatre, which agreement also provided that Paramount Theatres Limited should have the exclusive management and should decide all questions of policy relating to the operation of the said theatres, that is the New Theatre and the Brock Theatre, or either of them, at a monthly "rental" for the said New Theatre of \$200 per month and half the profits from the joint operation of the two theatres.

Laing assigned his interest in the lease to Dobbie and Ritchie about the 1st November, 1924, and the plaintiffs, at the request of the defendants and without knowledge of either of the agreements above referred to, by by-law passed on the 1st December, 1924, assented to the transfer to Dobbie and Ritchie, and Dobbie and Ritchie covenanted to perform and observe the terms of the original lease to the Brockville Opera House Company Limited, which included a covenant "to maintain and operate such opera house in a proper manner," and further the usual short form covenant, "and will not assign or sublet without leave."

The defendants never applied to the plaintiffs for their consent to the agreements above in part set forth, and the plaintiffs did not become aware of the nature thereof until shortly before the commencement of the third action. Upon becoming so aware of the nature and effect of the agreements, the plaintiffs caused to be served on the defendants, before the issue of the writ in the third action, notices claiming that by these agreements the defendants had broken the covenant against assigning or subletting without leave, and that these agreements in effect constituted an assignment of the lease or a subletting of the premises, and that the lease was thereby forfeited, and the plaintiffs demanded possession and claimed compensation for such alleged breach of covenant, and all rent, revenue, or profits derived under the provisions of the agreement with Paramount Theatres Limited.

At the trial, the alleged sublease having expired, the claim to the injunction was not pressed, nor was the claim to damages by reason of dilapidation, but the plaintiffs insisted that by reason of the two agreements there had been a breach of the covenant

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not to assign or sublet without leave, and that the plaintiffs were therefore entitled to forfeiture of the lease and to possession, an account, and double rental since the service of the notices. These notices were served on Ritchie and Dobbie on the 5th June, 1928, and on Paramount Theatres Limited on the 6th June, 1928.

Eventually counsel for the plaintiffs abandoned the contention that either of the documents was an assignment of the lease. But it was contended that the documents disclosed an effort to frame an agreement which was in reality a sublease, but was so camouflaged that it would pass as something less than that and so appear innocuous as a breach of the covenant not to sublet.

It was strenuously contended that art. 2, which provided for the exclusive management by Paramount Theatres Limited, amounted in fact to a provision for exclusive possession, and that you could not have exclusive management without having exclusive possession. Also the word "rent" was pointed to, and it was alleged that this word, under the authority of *Glenwood Lumber Co. v. Phillips*, [1904] A.C. 405, *Markham v. Paget*, [1908] 1 Ch. 697, *Daugherty v. Armaly* (1921), 49 O.L.R. 410, constituted a demise. *Seymour v. Lynch* (1885), 7 O.R. 471, *Currie v. Pennoch* (1913), 4 O.W.N. 1065, *Fitzgerald v. Barbour* (1908), 17 O.L.R. 254, and *S.C., sub nom. Loveless v. Fitzgerald* (1909), 42 Can. S.C.R. 254, were also referred to. But I am of opinion that the documents in question have not the ear-marks of a lease. There was no demise, no grant, no exclusive right to possession, and no estate or interest in the land conferred on Paramount Theatres Limited, and in my opinion the right to manage the theatre and so to use it was a licence and not a lease.

The mere letting into possession is not a breach of the covenant not to sublet: *Straus Land Corporation Ltd. v. International Hotel Windsor Ltd.* (1919), 45 O.L.R. 145, following *McCallum Hill & Co. v. Imperial Bank* (1914), 30 W.L.R. 343, 7 W.W.R. 981, 22 D.L.R. 203.

But, even if the agreements in question amounted to a parting with the occupation of the demised premises, the defendants did not commit a breach of the covenant merely by permitting another person to have the use of the premises, so long as the lessee retained legal possession himself. This is made clear by the judgment of the Court of Appeal in England in *Chaplin v. Smith*, [1926] 1 K.B. 198, where the covenant was stronger, viz., that the lessee "would not assign or underlet or part with possession of the demised premises or any part thereof," and Banks, L.J., in that case said (p. 206) that the learned trial Judge "must have held that a

man cannot permit another to occupy and at the same time himself remain in possession. In my opinion it is quite possible in law to do so;" citing *Jackson v. Simons*, [1923] 1 Ch. 373, and *Peebles v. Crosthwaite* (1896-7), 13 Times L.R. 37, affirmed *ib.* 198, 199. As Romer, J., said in *Jackson v. Simons*, "If the arrangement constituted an underletting it must have conferred upon Mr. Barron some estate or interest in land, and this, in my opinion, was not the effect of the arrangement. All that was conferred upon Mr. Barron was, as it seems to me, a mere privilege or licence to use a part of the demised premises."

I would also refer to *Mashiter v. Smith* (1887), 3 Times L.R. 673, in which the facts were that the defendant had allowed a travelling theatre to come upon one of the fields which he held from the plaintiff under his lease, charging 10 shillings a week for the accommodation. It was admitted that during all this time the defendant paid the rates and taxes upon the land and also was in occupation of all the ground except where the show was actually held, and Mr. Justice Day giving judgment said that in his opinion to constitute a breach there must be a substantial parting with a substantial portion of the demised premises.

Now it appears to me that the case at bar is covered by *Chaplin v. Smith*. The agreements in question were really operating agreements in which the receipts of the two theatres were pooled, and after payment of certain overhead expenses, part of which is called "rent" in the agreement, the balance remaining was to be divided equally between the defendants Dobbie and Ritchie and the defendant Paramount Theatres Limited. Possession as distinguished from occupation was not given to Paramount Theatres Limited. Dobbie and Ritchie retained the key and were liable for taxes, if any, and certain insurance, interest, if any, and payments on any mortgage or encumbrance on the New Theatre as they fell due. In fact there was no mortgage because the building was owned by the plaintiffs, but the covenant shews the intention, and furthermore it was provided that Dobbie and Ritchie were to be consulted as to repairs to the said theatre, furniture and appliances, and such new or additional furnishings and appliances as might be required for the reasonable and proper operation of the theatre, and these were to be treated as part of the operating expenses.

Unless the agreements can be read as giving Paramount Theatres Limited the exclusive possession, they could not, in my opinion, be subleases, because exclusive possession for whatever term may be granted is one of the ear-marks of a lease, and even

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if the agreements could be construed as giving exclusive possession of a portion of the theatre, there is no covenant in the original lease against subletting a part. But in my opinion there is no question but that these agreements are purely and simply operating agreements and are not subleases at all. True it may be that the effect of them has been perhaps to eliminate partially the New Theatre in favour of the Brock Theatre, and this was the real grievance which the plaintiffs set out to remedy, but it is a grievance which the citizens of Brockville have as distinct from the municipal corporation, and the municipal corporation must stand or fall by the terms of its lease. There was no evidence given that the lessees had not "maintained and operated such opera house in a proper manner," whatever that covenant may mean on its true interpretation.

The plaintiffs stand or fall, as admitted by their counsel, on the assertion that the documents in question constitute subleases; and, finding, as I do, that they do not, all the actions must be dismissed. I see no reason to withhold costs.

The plaintiffs appealed from the judgment of LOGIE, J.

April 2 and 3, 1929. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

R. S. Robertson, K.C., and H. A. Stewart, K.C., for the appellants, argued that the agreements between the parties were not mere licences (as found by the learned trial Judge), but were really assignments of leases, and so amounted to breaches of the covenant by the lessees not to assign or sublet without leave: *Queen Victoria Niagara Falls Park Commissioners v. International Railway Co.* (1928), 63 O.L.R. 49; *Glenwood Lumber Co. v. Phillips*, [1904] A.C. 405; *Roads v. Overseers of Trumpington* (1870), L.R. 6 Q.B. 56; *Curry v. Pennock*, 4 O.W.N. 1065; *Chaplin v. Smith*, [1926] 1 K.B. 198.

A. C. McMaster, K.C., for the defendants, respondents, contended that the agreements amounted to licences only, as exclusive occupation did not pass under them: Halsbury's Laws of England, vol. 18, para. 837; *Peebles v. Crosthwaite* (1897), 13 Times L.R. 198; *Jackson v. Simons*, [1923] 1 Ch. 373; *Young & Co. v. Liverpool Assessment Committee*, [1911] 2 K.B. 195; Foa's Relationship of Landlord and Tenant, 5th ed., p. 277. The notice of forfeiture was insufficient in point of time: *Horseby Estate Ltd. v. Steiger*, [1899] 2 Q.B. 79.

Robertson, K.C., in reply, said that the shortness in time of the notice of forfeiture was not pleaded.

April 19. LATCHFORD, C.J.:—These appeals are from the judgment of Logie, J., of the 14th November, 1928, dismissing each action with costs. The three actions were tried together.

The reasons for judgment are so full and accurate that it is unnecessary for me to repeat the statements of fact.

The main issue at the trial and on the appeal was in regard to the effect of the agreements, exhibits 8 and 9, between Paramount Theatres of the first part, Dobbie and Ritchie and one Laing (whose interest his associates afterwards acquired) of the second part, and Paramount Theatres of the third part.

The appellants contend that, contrary to the conclusion of Mr. Justice Logie, these agreements are tantamount to assignments of the lease, and that the lease was by due notice, pursuant to sec. 18 (2) of the Landlord and Tenant Act, R.S.O. 1927, ch. 190, properly declared forfeited for breach of the covenant of the lessees against subletting without leave of the lessor.

The first agreement, made in April, 1923, covered the relation of the parties for a period of one year, expiring on the 31st August, 1924. The second of a like character was for four years from the expiration of the first. Both are otherwise identical.

After recitals stating that Paramount Theatres are lessees of the Brock Theatre, and Ritchie and the others lessees of the New Theatre, and that the parties of the first and second parts desire that the parties of the third part shall operate the two theatres as a joint venture, the later agreement proceeds:—

“Now therefore this agreement witnesseth that, in consideration of the premises and of the mutual covenants and agreements herein contained, the parties hereto have and do hereby mutually covenant and agree together as in the following articles set out:—

“Article 1.—The parties of the first and second parts agree that the said operating company shall operate and the said operating company agrees to operate the said theatres, book and supply films and other entertainments as they may deem best and most advantageous for the carrying on of the business of the said theatres from the 1st day of September, 1924, to the 4th day of September, 1928, and for this service the parties of the first and second parts agree to pay, out of the joint earnings of the said theatres, to the operating company the sum of \$50 per week as part of the operating expenses of the said theatres.

“Article 2.—In so operating the theatres the operating company shall have the exclusive management and shall decide all questions of policy relating to the operation of the said theatres, or either of them.

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"Article 3.—The parties of the second part agree to pay all taxes and insurance (except insurance for public liability and payments to Workmen's Compensation Board) and all interest and payments falling due on any mortgage or encumbrance on the said New Theatre as they fall due.

"Article 4.—The gross receipts of the said two theatres shall be deposited in such regular chartered bank as the said operating company may designate, and such gross receipts shall first be used to pay the operating expenses of the theatres in which shall be included the aforesaid booking fee, the sum of \$115.38 per week to be paid to the party of the first part as rent of the said Brock Theatre, and the sum of \$200 per month to be paid to the parties of the second part as rent of the said New Theatre, as well as all other operating expenses, including the costs of films, employees' wages, heat, light, public liability, insurance, and such other items as are properly chargeable to operating expenses. Should the earnings of the said theatres not be sufficient to meet the payment of the charges as provided for in this paragraph, then the parties of the first and second part shall each abate in the payment of the rent herein provided to be paid in the same proportion as the amount of rent payable to each of the said parties respectively. All profits made by the said theatres over and above the amounts necessary to pay the said operating expenses, rentals, and outgoings hereinbefore referred to, shall be divided between the parties of the first and second parts, share and share alike."

"Article 8.—Provided and it is hereby agreed that the parties of the second part shall be consulted as to repairs to the said theatres, furniture and appliances, and such new or additional furnishings and appliances as may be required for the reasonable and proper operation of the said theatres or either of them shall be treated as part of the operating expenses hereinbefore referred to."

"Article 10.—The licences of the Provincial Government and of the city authorities shall stand in the name of the operating company for the purposes and benefit of the parties interested under this contract, so long as this contract shall remain in force."

I have omitted several clauses which relate only to accounting, etc., between the parties, such as the rendering of weekly statements.

Notice of forfeiture for breach of the covenant not to assign or sublet without leave, and not for breach of any other covenant, was given to Ritchie and Dobbie on the 5th June and to Paramount Theatres on the 6th June. Relying on the observations

of Lord Russell of Killowen in *Horsey v. Steiger*, [1899] 2 Q.B. 79, at pp. 90 and 91, Mr. McMaster contends that the notice was insufficient in time. Possibly it might be so considered if it required the tenant, as in the case cited, to make extensive repairs —*vide* observations of Collins, L.J., in *Penton v. Barnett*, [1898] 1 Q.B. 276—but in this case, where “the particular breach complained of” was not “capable of remedy,” the notice gave the defendants a reasonable time for considering their position, and in the circumstances no longer time is in my opinion made necessary by the statute.

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The sublease to Gorman or Doran, though mentioned in the notice of forfeiture, may be disregarded, as the plaintiffs consented to it, and no contention was based upon it before this Court.

The question whether the agreements mentioned constituted a breach of the defendants’ covenants not to assign or sublet without leave is somewhat difficult of solution. Mr. Robertson’s argument is that, while not in form assignments of the lease, they are such in effect and fact, and that upon the notice given the lease was forfeited and the plaintiffs became entitled to possession of the demised premises.

The word “rent,” used as a description of the \$200 a month agreed to be paid by Paramount Theatres to Dobbie and his associates for the New Theatre, is relied on as supporting the contention that there was a virtual demise. This argument might have weight were it not for the reciprocal provision which also included in “operating expenses” the sum of \$115.38 per week to “be paid to the said party of the first part as rent of the said Brock Theatre.” There was no demise of that theatre to the parties of the second part. It is not pretended that they were tenants of the Brock Theatre. They could not therefore be considered under obligation to pay rent, in the primary meaning of the word, for premises never demised to them. I consider that the obvious intention of all parties to the agreement as expressed was that what they called “rent” was merely one of several factors to be considered in matters of accounting between the parties as the respective value of each of the theatres which they operated. This definition of the term by the agreement itself excludes any other. The argument based on the word “rent” affords in my opinion not the slightest support to the appeal.

The test of whether a document is a lease appears to depend on whether it confers a right of exclusive occupation. “It is not, however, a question of words but of substance. If the effect of the instrument is to give the holder an exclusive right of occupation of

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the land, though subject to certain reservations or to a restriction of the purposes for which it may be used, it is in law a demise of the land itself." *Glenwood Lumber Co. v. Phillips*, [1904] A.C. 405, 408; *Young & Co. v. Liverpool Assessment Committee*, [1911] 2 K.B. 195.

Other relevant cases are mentioned in Fawcett's and Foa's books on Landlord and Tenant. I shall cite but one. In *London and North Western Railway Co. v. Buckmaster* (1874), L.R. 10 Q.B. 70, the agreement granted permission to the defendants to use and occupy stables on the railway premises in consideration of the payment of a monthly rent and of undertaking during occupancy and use to observe the by-laws of the company and to deliver up possession after one month's notice to be given at any time. It was held by Blackburn, Quain, and Archibald, JJ., that the intention of the plaintiffs was to retain control over the stables and not to part with their exclusive possession to the defendants. On appeal to the Exchequer Chamber (1875), *ib.* 444, the Court was equally divided, the result being that the judgment in the Court below stood unimpaired.

In the course of his judgment in *Young & Co. v. Liverpool Assessment Committee*, [1911] 2 K.B. 195, Lord Alverstone, after referring to the binding effect of the decision in *London and North Western Railway Co. v. Buckmaster*, said (p. 212):—

"The *ratio decidendi* in that case was that the Court came to the conclusion that the railway company never meant to give up the actual control and management of the stables and the coal stores to which the stables were merely ancillary."

In the case at bar, Dobbie and Ritchie did not mean to give up and did not in fact give up to Paramount Theatres the actual, and I will add, the exclusive control of the New Theatre. There was therefore no assignment or subletting of their term or of any part of it and no breach of the covenant in that regard.

Nor was there any substantial damage to the building or to the reversion on which breach of the covenant to repair could be based, nor does failure to comply for a time with the requirements of the Provincial Government constitute such a breach.

On all grounds the appeal fails. It should be dismissed with costs.

MASTEN, J.A.:—The substantial question presented on this appeal is as to whether there has accrued a ground of forfeiture of the lease dated March, 1910, and referred to in the pleadings. Questions of failure by the defendants Dobbie and Ritchie to

manage and operate the theatre in question properly and failure to make repairs in accordance with the covenant to repair contained in the lease were also raised, but in regard to these minor questions it suffices to say that I see no reason for reversing the findings of fact of the trial Judge.

Whether the agreement between Dobbie and Ritchie, of the one part, and Paramount Theatres Limited, of the other part, operates as a sublease or merely as a licence, is a question of considerable nicety and interest. The facts are so fully and clearly stated by the trial Judge that it is unnecessary to repeat them here.

It is sufficient to say that the plaintiffs contend that the agreement of the 27th August, 1923, operated as a sublease by Dobbie and Ritchie to the Paramount Theatres Limited in breach of the covenant not to assign or sublet without the consent of the plaintiffs; that the notice served by the plaintiffs on the defendants, dated the 5th June, 1928, purporting to cancel the lease of 1910 in consequence of a breach of the covenant not to sublet, was effective; and that the judgment of this Court should declare the lease cancelled. The defendants deny that the agreement of the 27th August, 1923, was a sublease, and allege that it was merely a licence, and on this appeal raise certain other defences—e.g., waiver of forfeiture and insufficiency of notice.

The trial Judge has held that the agreement in question was a mere licence and not a sublease, and I agree in his conclusion, and adopt his reasoning by which that conclusion is reached.

I only desire to add one or two observations in view of the discussion before this Court.

On the evidence it seems to be established that Dobbie and Ritchie retained legal possession and the Paramount company enjoyed occupancy only.

At p. 58 of the evidence, Ritchie deposes as follows:—

“Mr. McMaster: You made arrangements with the Paramount, which is in two written documents? A. Yes.

“Q. Who is manager of the Paramount-Brock Theatre, looking after their interests? A. Mr. McLennan.

“Q. Who is your manager and who continues to look after it? A. Myself and Mr. Lindsay.

“Q. Who has the key of the Brock Theatre? A. Mr. McLennan.

“His Lordship: You and Lindsay are managers of the New Theatre? A. Yes.

“Q. Who is manager of the Brock? A. McLennan.

“Q. McLennan has a key of the Brock Theatre? A. Yes.

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"Mr. McMaster: You haven't a key? A. No, sir.
 "Q. You have a key of the New Theatre? A. Yes.
 "Q. Mr. McLennan hasn't it? A. No, sir.
 "Q. Who dealt with the matter of the so-called repairs? A. At the New Theatre?
 "Q. Yes, who saw the chief inspector when he came down? A. Mr. Dobbie and myself.
 "Q. Dealt with it and went through the theatre? A. Yes."

So far as has been pointed out to us, this evidence is not discussed in cross-examination and no evidence was given in reply.

Notwithstanding the rather captivating presentation of Mr. Robertson that the essence of the agreement in question was control by Paramount Theatres of the property in question, and was not like the control of a business which might be carried on anywhere, I think we cannot, in the face of the evidence above quoted, hold otherwise than that Dobbie and Ritchie never gave up legal possession, and that Paramount Theatres never acquired exclusive possession—and exclusive possession is an essential factor or element in a demise.

Standing as it does, the evidence quoted above appears to bring the case squarely within the law as laid down in *Chaplin v. Smith*, [1926] 1 K.B. 198. That case is, of course, not binding upon us in this Court, but its reasoning commends itself to me, and I think it should be followed.

The result is that in my opinion the occupation of Paramount Theatres was not exclusive. Dobbie and Ritchie remained in legal possession, and there was no breach of the covenant and no forfeiture.

With respect to the use of the term "rent" in the agreement of 1923, as necessarily importing a lease, my brother Orde observed in the course of the argument that the word "rent" does not carry with it any implication of a lease in the circumstances here existing. It is merely a way of expressing the method of division of the profits of the joint venture between Dobbie and Ritchie, of the one part, and Paramount Theatres, of the other part. Paramount Theatres collected all the income from both theatres, and, after providing for operating expenses, that company receives a certain "rent" for their own theatre, and Dobbie and Ritchie receive a certain "rent" for their theatre. It is obvious that Paramount Theatres cannot pay rent in any proper sense to themselves, nor can a lease to themselves of their own theatre be implied, and in the same agreement the term "rent" must *prima facie* have the same import wherever used with reference to the allowance to

Dobbie and Ritchie. The provision is in reality an allowance to each party in consideration of the capital contributed to the joint adventure.

These considerations seem to me decisive of the question raised, and to render unnecessary a discussion of the other grounds of defence raised by Mr. McMaster. In regard to them I express no opinion.

The appeal should be dismissed with costs.

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RIDDELL, J.A.:—I agree in both the reasoning and result of my brother Masten's judgment. All the law applicable may be found in the cases of *Glenwood Lumber Co. v. Phillips*, [1904] A.C. 405; *Young & Co. v. Liverpool Assessment Committee*, [1911] 2 K.B. 195; and in *Margate Corporation v. Petman* (1912), 10 L.G.R. 147, cited by me on the argument.

ORDE and FISHER, JJ.A., agreed with the Chief Justice and MASTEN, J.A.

Appeal dismissed.

[APPELLATE DIVISION.]

RUBAS v. PARKINSON.

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Company—"Preference Shares"—Contract—Fulfilment—Shares Carrying no Voting Power—Companies Act, R.S.C. 1927, ch. 27, secs. 10, 56.

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"Preference share" is an indefinite term, having a commercial or popular rather than a legal import.

Where a preference of any character is given to the holder of a share, the circumstance that in other respects he is deprived of the usual rights of a holder of common shares does not prevent his share from being properly designated a "preference share."

Shares in a company incorporated under the Dominion Companies Act were issued to the defendant in fulfilment of a contract with the plaintiff by which, for good consideration, the defendant was to receive "seven per cent. preferred stock" in a company to be formed:—

Held, that the shares, being shares carrying a preferred dividend of 7 per cent., and properly issued under the authority of the Act, were "preference shares," notwithstanding that they carried no voting power; and they were a complete fulfilment of the terms of the agreement.

Sections 10 and 56 of the Act considered.

AN appeal by the plaintiff from the judgment of WRIGHT, J., in an action for foreclosure, reducing the principal of the mortgage from \$1,000 to \$750.

RUBAS The following statement is taken from the judgment of MASTEN,
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PARKINSON, J.A.:—

This is an action of foreclosure, begun by a writ of summons specially endorsed, and the defence is raised by the affidavits of the defendants as follows. The defendant Arthur Parkinson swears:—

"3. That the mortgage under which the plaintiff has commenced this action was obtained by the plaintiff from me by fraudulent misrepresentation in that the shares in the Dominion Used Fixtures Limited, a company which the plaintiff proposed to incorporate, and which were to be the consideration for the giving of the mortgage in question, were to be participating and voting shares, but those shares for which certificates have been tendered to me by the plaintiff are non-voting and non-participating shares.

"4. That the plaintiff entered into a collateral agreement at the time the mortgage in question was executed by the defendants that the mortgage was to be paid from the profits on the shares to be issued to me in the company proposed to be incorporated by the plaintiff.

"5. That I am counterclaiming to have the mortgage in question declared void and set aside, and for damages for the fraudulent misrepresentations made by the plaintiff to me as set forth in the 3rd paragraph hereof."

The other defendant, the wife of Arthur Parkinson, swore that the mortgage was to be paid off out of the profits on the company's shares hereinafter mentioned.

The learned trial Judge held that the mortgage in question, the giving of which by the defendants formed part of a larger transaction, could not be set aside, and granted judgment of foreclosure, but, on the ground that the shares issued to the defendant Arthur Parkinson were not of as much value as he was entitled to receive under the agreement in question, he reduced the principal of the mortgage from \$1,000 to \$750.

The plaintiff claims on this appeal that the mortgage should be enforced for the full amount of its face value, namely, \$1,000.

The agreement pursuant to which the mortgage in question was given is as follows:—

"Memorandum of Agreement.

"We, the undersigned, George Rubas and Arthur Parkinson, hereby mutually agree, one with the other, as follows:—

"Arthur Parkinson is to subscribe for \$2,000 par value of seven per cent. preferred stock in a company to be formed by George

Rubas under the name of Dominion Used Store Fixtures Limited or some other similar name, and is to pay for the same as follows:—

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“1. By the assignment of a mortgage of a farm in the county of Ontario, the said mortgage having a face value of \$500.

“2. By the giving to George Rubas of a second mortgage on number 47 Secord-avenue, Toronto, for the sum of \$1,000.

“3. By the payment to the said George Rubas of \$5 or more a week until the remaining sum of \$500 is paid.

“George Rubas agrees to issue the preferred stock aforesaid to the said Arthur Parkinson as the moneys hereinbefore referred to are paid to him.

“And further agrees to incorporate the company as aforesaid and to employ the said Arthur Parkinson in his business from the 1st September, 1927, and in the company after it is formed, at a salary of not less than \$35 per week, payable weekly.

“In witness whereof the parties hereto have hereunto set their hands and seals this 31st day of August, A.D. 1927.

“Arthur Parkinson (seal)
“Geo. Rubas.” (seal)

In pursuance of that agreement Rubas proceeded to incorporate a company under the Dominion Companies Act. The charter is dated the 5th October, 1927, and provides for the creation of 2,000 preferred shares of the par value of \$25 each, with respect to which shares the charter contained the following clause:—

“The said preferred shares shall carry and be subject to the preferences, priorities, rights, privileges, limitations and conditions hereinafter set forth, that is to say:—

“1. The holders of the preferred stock are to be entitled to receive in each half year out of the surplus profits of the company, a fixed annual dividend at the rate of seven (7%) per centum payable half-yearly on the first days of February and August in each year, to be declared and paid before any dividend is declared or paid on the common stock, and unless the said dividends, which shall be cumulative on the preferred stock, remain unpaid for a period of three years, the holders of the preferred stock shall have no voting powers whatever, but should such preferred dividends remain unpaid for a period of three years, the holders of the preferred stock shall have equal voting rights with the holders of the common stock share and share alike.

“2. The dividends on the common stock may also be declared out of the surplus net profits of the company for any half-year remaining after payment of the full half-yearly dividend on the preferred stock for such half-year.

RUBAS "3. In case of liquidation or dissolution of the company, holders of the preferred stock will be entitled to be paid in full the par value of their shares and the accrued dividend charges, but no more, before the remaining assets and funds shall be divided, and all the remaining assets and funds shall be divided among the holders of the common stock."

After the incorporation of the company in October, 1927, certificates for preference shares carrying 7 per cent. dividends were issued to the defendant Arthur Parkinson, covering 69 shares, being as many shares as had been paid for by him. These certificates have endorsed on them the provisions relating to these preference shares as above quoted.

In the course of his judgment at the trial the learned trial Judge says:—

"The stock which he received was not the stock contracted for, but was of a less valuable nature, and he is entitled to recover the difference between the value of the stock received and the value of the stock which it was contracted by the plaintiff he should receive. What the difference is is difficult to estimate. Apparently the company has been earning considerable profits, so that, if the stock which the defendant held was entitled to participate in it, it would be receiving fairly large dividends and be so much more valuable than it is with the non-participating conditions attached to it. I think the matter could only be accurately estimated perhaps on a reference, but I should think the stock received by the defendant is not worth more than 75 per cent. of what he contracted to receive; the \$1,000 of stock which formed the consideration for the mortgage does not, in my view, exceed the value of \$750. I think the defendant is entitled to recover by way of counterclaim the sum of \$250 in respect of the mortgage transaction, and if it is necessary I allow the defendant to amend his pleadings to include such counterclaim. If either party is dissatisfied with the allowance of \$250 he is entitled to a reference at his own risk as to costs.

"In the result there will be judgment for the plaintiff for \$750 on the covenant, with the directions usual in a judgment for foreclosure."

The plaintiff appealed.

April 4. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

I. Levinter, for the appellant, argued that the mortgage was enforceable for its face value of \$1,000. The defendant received

the proper consideration for the giving of the mortgage, namely preference shares.

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E. E. Wallace, K.C., for the defendants, respondents, contended that the mortgage under which the plaintiff commenced the action was obtained by fraud in that the shares which were to be the consideration for the giving of the mortgage were to be preference shares, which designation carried with it the qualities of voting and participating, whereas the shares tendered the defendants were non-voting and non-participating shares. He also contended that there was a collateral agreement between the parties under which the mortgage was to be paid from the profits on the defendants' shares.

Levinter, in reply, argued that the words "preferred stock" in the written agreement did not necessarily mean voting or participating stock, and there was no collateral agreement.

April 19. MASTEN, J.A.:—The term "preference shares" is not interpreted or defined by the Companies Act of Canada, R.S.C. 1927, ch. 27. It is a somewhat indefinite term, having a commercial or popular rather than a strictly legal import. I find no case in Canada or England in which the term has been authoritatively defined, but a somewhat extended research leads me to the conclusion that, if a preference of any character whatever is given to the holder of a share, the circumstance that in other respects he is deprived of the usual rights belonging to a holder of common shares does not prevent his shares from being properly designated as preference shares.

Section 56 of the Act provides as follows:—

"The directors of the company, when no provision is made by letters patent or supplementary letters patent for the creation of either preferred stock or deferred stock, may make by-laws,

"(a) for creating and issuing any part of the capital stock as preferred stock or deferred stock, giving the same such preference and priority as respects dividends and in any other respect over ordinary stock or other classes of preferred stock or deferred stock, and also prescribing such restrictions as respects voting rights and in any other respect as is by such by-law declared."

And sec. 10 of the Act provides that there may be embodied in the letters patent any provision which could, under the Act, be contained in any by-law of the company.

These provisions of the Companies Act authorised the Department to issue the charter in the form in which it was issued, and appear to me to warrant the designation of these shares as preference shares.

App. Div. In Palmer's Company Precedents, 13th ed., pp. 807, 808, the learned author discusses the question "whether there is to be attached to the preference shares any special right of voting, or whether the rights of voting attached to the shares are to be restricted or only to be available in certain cases or for certain purposes." In so doing he says:—

"Formerly it was not usual to distinguish between the preference shares and the ordinary shares as regards voting. They were all treated as interested alike in the company and given the same right of voting, but for many years past it has been customary to give only qualified voting rights to preference shares. . . . Sometimes preference shareholders are given no right of voting whatsoever at general meetings. . . . Sometimes preference shares are given rights of voting on a modified scale—for example, one vote for every two preference shares against one vote for every ordinary share."

The most recent book of forms customarily used in Canadian practice is the second edition (1927) of Fraser's Canadian Company Forms, and the forms of preference share by-laws there shewn, at p. 379 *et seq.*, provide in nearly every instance that the holders of preference shares shall not have any right of voting at any meeting of the shareholders of the company, nor shall such preference shares qualify any person to be a director of the company, unless and except under certain specified conditions; but, notwithstanding these provisions, they are still denominated preference shares.

In Healey on Joint Stock Companies, 3rd ed., p. 142, it is said: "The expression 'preference' is in itself equivocal. All that it fairly imports is that *some* preference is given to the holders of the shares to which the import is attached."

The American text-books and authorities are to the like effect.

In 14 Corpus Juris, sec. 573, it is said:—

"Simply calling stock preferred stock does not *per se* define the rights of such stock; but in order to determine in what respect the holder of such stock is to be preferred to the ordinary or common stock, regard must be had to the statute or contract under which it is issued; and of course the charter and by-laws of the corporation in force at the time the preferred stock is issued forms a part of the contract between the corporation and the holders of such stock, so that their rights will be affected thereby."

And in Words and Phrases it is said:—

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"The expression 'preference shareholder' is equivocal. It by no means clearly indicates what are the rights of those to whom it applies. All which the language fairly imports is that some preference is given to the person to whom the language applies. How far the preference is to extend must be ascertained by other media than the mere expression itself;" referring to the case of *Hackett v. Northern Pacific Railway Co.* (1905), 140 Fed. Repr. 717. See also Cook on Corporations, 8th ed., secs. 12 and 267.

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In Stiebel's Company Law, 2nd ed., p. 362, it is said:—

"The number of votes and the voting power given to each share is a matter which is regulated by the articles of association of each company. . . . The usual provision . . . is to give each member one vote for every share he holds, though frequently certain classes of shares, e.g., preference shares, are not given a vote or are only given a vote on certain specified matters."

I have referred to these text-books, not as being authoritative, but as making it plain that in practice, and as understood by the profession and the public, shares which carry a preference may properly be denominated preference shares, though in certain respects they may be shorn of the rights which belong to common shares.

Applying this view to the facts of this case, it appears, first, that the shares which the defendant Arthur Parkinson has received were properly issued under the authority of the Dominion Companies Act; that they were in fact and in truth shares carrying a preferred dividend of 7 per cent., and were properly designated as preference shares, notwithstanding the fact that they carried no voting power. They were, therefore, a complete fulfilment of the terms of the agreement quoted above; not only so, but certificates covering these shares were issued from time to time to the defendant Arthur Parkinson, were received by him and accepted, and dividends were paid him on account of them, and no question such as is now put forward by the defence was ever raised until this action was brought.

The learned trial Judge does not find that there was any collateral agreement outside of the written memorandum above quoted, and on a perusal of the evidence I am of the opinion that no such finding could possibly have been made.

The defendant was therefore bound by the terms of the written agreement, which is plain on its face, as to the character of the stock which he was to receive, and the dividend which it was to carry. He signed the agreement and acted upon it, and cannot be heard to say that he did not understand its purport.

App. Div. For these reasons, I am, with the greatest respect, compelled to differ from the view expressed by the learned trial Judge, and to hold that the plaintiff must succeed on this appeal, and that the mortgage in question must be declared to be valid and enforceable to the extent of \$1,000 of principal.

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J.A.

Masten. LATCHFORD, C.J., and ORDE and FISHER, J.J.A., agreed with MASTEN, J.A.

RIDDELL, J.A.:—I wholly agree both in the result and the reasoning: it seems to me clear that, there being the power given to issue “preference stock” in the form in which the stock in question was issued, of which power the defendant must, in law, be considered to have had notice, he should, if he did not want that kind of stock, have stipulated for another kind; not having done so, I think he has received what he bargained for.

Appeal allowed with costs.

[APPELLATE DIVISION.]

1929. **GEORGE TAYLOR HARDWARE LTD. v. CANADIAN ASSOCIATED GOLD FIELDS LTD.**

April 23.

Mechanics' Liens—Proceeding to Enforce Lien on Mining Land—Style of Cause—Failure to Describe Character in which one Defendant Sued—Character Described in Statement of Claim—Rule 4—Form 4—Time for Registration of Claim of Lien for Materials—Furnishing of Last Material—Mechanics' Lien Act, R.S.O. 1927, ch. 173, sec. 21(2)—Disconnected Items without Prevenient Agreement—Materials Supplied not to Go into Structure of Mine, but merely Ancillary to Mining Operations—Sec. 5 of Act—Construction.

In a mechanics' lien proceeding, commenced, in accordance with the Mechanics' Lien Act, by the delivery of a statement of claim, the defendant C. was sued in his representative capacity as trustee in bankruptcy of the defendant company:—

Held, that it was not necessary that the capacity in which C. was sued should be stated in the style of cause; it was sufficient that the capacity was adequately set forth in the body of the statement of claim.

The rules and forms, which have legislative effect, provide that the character in which parties sue or are sued is to be indicated, not in the style of cause, but in the endorsement on the writ of summons: Rule 4 and Form 4.

The time for registering a claim of lien for material supplied begins to run upon the furnishing or placing of the last material furnished or placed: Mechanics' Lien Act, sec. 21(2); and where materials are furnished from time to time, although not in pursuance of any pre-existing contract, the time for registration does not begin to run until the furnishing of the last material.

Morris v. Tharle (1893), 24 O.R. 159, and *Hurst v. Morris* (1914), 32 O.L.R. 346, followed.

By sec. 5 of the Act, a lien is given for the claim of any one who furnishes any material to be used in the making and construction of any mine:—

Held, that, the policy of the Act being to protect those who supply labour and material for the improvement of realty owned by another, the words of sec. 5 should receive a wide construction, and should, in the case of a mine, cover materials which are not to go into the structure of the mine, but are merely ancillary to the mining operations.

Wortman v. Frid-Lewis Co. (1915), 33 W.L.R. 119, and *Johnson v. Starret* (1914), 127 Minn. 138, approved.

AN appeal by the defendant company and the defendant Clarkson, the trustee in bankruptcy of the property of the company, from the judgment of his Honour Judge Hartman in proceedings under the Mechanics' Lien Act. By the judgment appealed from, the claim of the plaintiff company to a lien was upheld as against the appellants.

April 10 and 11, 1929. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and MIDDLETON, J.J.A.

H. E. Manning, for the appellants. The action was never properly constituted, the plaintiffs having failed to commence it against the defendant Clarkson, in his representative capacity, before the expiration of 90 days from the delivery of the last item of goods for which claim is made. The defendant Clarkson is an owner: Bankruptcy Act, R.S.C. 1927, ch. 11, secs. 9(6), 23. The owner is a necessary party to the action: Mechanics' Lien Act, R.S.O. 1927, ch. 173, secs. 1 (c), 16, 22, 23. In the absence of a necessary party the action must fail: *Larkin v. Larkin* (1900), 32 O.R. 80, at p. 85; *Gooderham v. Moore* (1899), 31 O.R. 86. The trust-estate is not bound where the trustee is not sued in a representative capacity: *Turville v. Malloy* (1929), 63 O.L.R. 612. At the trial application was made to amend by describing the defendant Clarkson in his representative capacity in pursuance of the Bankruptcy Act, sec. 38. No amendment should be permitted to take way a defence under a statute of limitation: *Hudson v. Fernyhough* (1889), 61 L.T.R. 722. In any event, the plaintiffs' claim arose on a series of separate and independent contracts for goods, not resting on any general arrangement for the supply thereof under one contract, and therefore no claim for lien is maintainable for any goods delivered on or prior to the 26th February, 1928, because the claim for lien was registered on the 27th March, 1928: *Chadwick v. Hunter* (1884), 1 Man. R. 39; *Stephens Paint Co. v. Cottingham* (1916), 10 W.W.R. 627; *Rathbone v. Michael* (1909), 19 O.L.R. 428; *Fulton Hardware Co. v. Mitchell* (1923), 54 O.L.R. 472; *Brooks-Sanford Co. v. Theodore Telier Construction Co.* (1910), 22 O.L.R. 176. The

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cases relied on by the plaintiffs at the trial are distinguishable on the ground that in all of them there was an antecedent general understanding which does not exist in this case: *Morris v. Tharle* (1893), 24 O.R. 159; *Whitlock v. Loney* (1917), 38 D.L.R. 52; *Robock v. Peters* (1900), 13 Man. R. 124; *Flett v. World Construction* (1914), 15 D.L.R. 628; *Polson v. Thomson* (1916), 29 D.L.R. 395. If the claim for lien can be maintained on the ground that the goods were delivered "on an open account," the account ceased to be an "open account" with respect to all items included in the promissory note for \$6,845.18 given on the 31st January, 1928. The theory of the open account argument in *Morris v. Tharle* (*supra*) is that each successive purchase merges and extinguishes the cause of action in respect of each earlier purchase. It cannot be contended that the purchases after the giving of the promissory note extinguished or were intended to extinguish it, because the claim for lien includes an item of \$50.50 for interest. If the plaintiffs have a valid claim for lien for all articles properly the subject of a mechanic's lien, the plaintiffs' claim must nevertheless fail as to the numerous items appearing in the invoices for chattels such as wrenches, shovels, coke, chalk, tinfoil, oil, pails, rivets, etc. The cost awarded against the defendants have not been fixed on the proper principle and should be taxed.

H. H. Davis, K.C., for the plaintiffs, respondents, relied on *Hurst v. Morris* (1914), 32 O.L.R. 346, and said that, because of the changes in the statute law, the earlier cases were inapplicable.

April 23, 1929. The judgment of the Court was read by MIDDLETON, J.A.:—Upon the argument of the appeal certain minor matters were disposed of, but judgment was reserved with respect to the matters to be discussed.

The first question argued was that, inasmuch as Clarkson was not described in the style of cause as trustee in bankruptcy of the company, the proceedings were entirely nugatory, and the lien, even if otherwise valid, was lost, as the time for bringing an action for its enforcement has now gone by and an amendment could not be permitted. The fact that Clarkson was sued in his representative capacity is adequately set forth in the statement of claim by which the proceedings were initiated, and this is, we think, adequate, and, if necessary, would justify an amendment of the style of cause. It is very important to note that the rules and forms, which are given legislative effect, indicate that the character in which parties sue or are sued is to be indicated, not in the style of cause, but in the endorsement on the writ of summons. See Rule 4 and Form 4.

The second question argued was that the plaintiffs' claim consists of a series of items supplied not in accordance with any preliminary bargain or contract, but from time to time as requested by those operating the mine. Each item or independent order, it is said, is an independent cause of action, and therefore all those supplied prior to the 26th February, 1928, are barred by reason of the failure to register the lien within time. The case was argued as to this as though the Statute of Limitations was applicable. It was said that each order and delivery constituted a separate cause of action, and because it could have been sued for separately the limitation clauses of the Mechanics' Lien Act applied to it. It is, of course, a platitude to state that the point from which the statutory period runs depends entirely upon and must be gathered from the statute itself. The ordinary statutory limitation begins to run so soon as the cause of action is completed, so that a writ may be issued. The statute here in question (Mechanics' Lien Act, R.S.O. 1927, ch. 173, sec. 21(2)) provides that the time-limit with respect to material supplied shall commence to run upon the furnishing or placing of the last material furnished or placed. This provision was introduced upon the revision of the Act in 1896, 59 Vict. ch. 35, sec. 21(2). Before that date the statute had provided that the time should run from the furnishing of the materials. The difficulty created by cases in which material had been furnished from time to time upon a running account had been dealt with in a series of cases. In these it had been held that where the material was all furnished in pursuance of an entire contract the time would not begin to run until the last material was furnished under the contract. Where goods were furnished from time to time, but not in pursuance of any pre-existing contract, the Court in *Morris v. Tharle* (1893), 24 O.R. 159, found in favour of the lienholder, upon the theory that where goods were supplied in this way, on each order being placed a new contract was implied not simply to pay for the goods then delivered, but an entire contract to pay not only for these goods but for the earlier deliveries. This, no doubt, was present to the mind of the Legislature when three years later the Act was revised; and that the revision was effective is made plain by the decision of this Court in *Hurst v. Morris*, 32 O.L.R. 346.

The third question raised is that many items covered by the lien, as it is said, were not lienable, as they were not to go into the structure of the mine, but were ancillary merely to the mining operations carried on, e.g., coal and coke supplied for use in the operation of the mine by supplying power by which material excavated could be hoisted, and machinery and construction material could be lowered. This question must now primarily depend upon

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the wording of the statute. Eliminating immaterial words, by sec. 5 a lien is given for the claim of any one who "furnishes any material to be used in the making and constructing of any mine." Similar words were given very wide effect in the case of *Wortman v. Frid-Lewis Co.* (1915), 33 W.L.R. 119. A much more elaborate discussion is found in the Minnesota case of *Johnson v. Starret* (1914), 127 Minn. 138, where it was held that coal and gasoline for the generating of power, dynamite for blasting, lubricants, lighting material, supplies, and material for the erection of a tool-house furnished by excavating contractors, were lienable as being contributions to the improvement of the defendant's realty. Supplies for repairs and parts of excavating machinery were not lienable, being merely contributions to the personal property of the contractors. Materials furnished in good faith for the improvement of realty would be lienable even though not actually used in the work. In this decision the many complicated American cases are collected and reviewed, and the principle is laid down that no narrow or limited construction of the lien law should be indulged in by the Courts, the policy of the Act being to protect those who supply labour and material for the improvement of realty owned by another.

Upon the argument of the appeal we intimated that we would lay down the principle that we thought should govern, and that if the parties are unable to agree in the application of this principle to the facts of the case the matter should be referred back to the learned Judge to review the account in the light of the principle adopted.

An order should be framed embodying our decision upon the matters dealt with at the hearing and the conclusions at which we now arrive. The lienholders should be allowed their costs of this appeal.

Order accordingly.

[APPELLATE DIVISION.]

1929.**April 23.****HARDING v. EDWARDS AND TATISICH.****EDWARDS v. TATISICH.****GALL v. EDWARDS AND TATISICH.**

Negligence—Motor-vehicles upon Highway—Collisions—Rule of Road—Highway Traffic Act, sec. 35 (10)—Liability of Original Wrongdoer for all Subsequent Casualties—Liability whether Consequences Probable or not—Absence of New or Independent Action by Intermediary—Conduct in Emergency.

T., driving her motor-car westerly along the northerly side of a highway, was preceded and followed by many cars. On the southerly

side of the highway there was an almost continuous stream of cars passing in the opposite direction. With the intention of passing the car immediately in front of her, she turned southerly out of her line of traffic; and E., who was driving a car in an easterly direction, and was not far from where T. turned out, thought that a head-on collision was probable as a result of her conduct. To avoid this, he swerved his car to the south upon the gravel-strip of the road, and so passed her without injury; he did not, however, succeed in regaining his place in the east-bound line of traffic, but swung so far over that he was brought into contact with two cars proceeding westerly and injured them. Actions were brought against E. and T. by the owners of these two cars, and an action was brought by E. against T.:—

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Held, by the majority of the Court, affirming the judgment of the trial Judge, that the whole series of disasters was due to T.'s turning out to pass the car in front of her, contrary to the Highway Traffic Act, R.S.O. 1927, ch. 251, sec. 35 (10), in that "the portion of the highway in front of her and to the left of the vehicle to be passed" was not "safely free from approaching traffic;" and she was liable for all the damages that flowed in sequence from her initial wrongful act.

The aggregate of the damages, however large, is of no consequence in considering the question of liability.

E. was not to be regarded as guilty of negligence; in the emergency created by the wrongful act of T., he could not be expected to exercise nice judgment and prompt decision.

Admiralty Commissioners v. S.S. Volute. [1922] 1 A.C. 129, and *S.S. Singleton Abbey v. S.S. Paludina*, [1927] A.C. 16, followed.

There was no new or independent action by any one; and, as it was admitted that T. was guilty of negligence, the Court had not to consider in a chain of causation one of the elements in legal liability —the foresight or anticipation of "the reasonable man."

It is not only the natural and probable consequences of his action for which a wrongdoer is liable. While the probability of evil consequences is material in determining whether the defendant was negligent or not—whether he was guilty of want of reasonable care according to the circumstances—he is liable for those consequences whether probable or not.

In re Polemis and Furness Withy & Co., [1921] 3 K.B. 560, followed. *Per MAGEE, J.A.*, dissenting:—T. was guilty of negligence in turning to the left in front of E., and thus forcing him from the paved roadway upon the gravelled part of the road at his right; and, had the ultimate collisions occurred immediately after and while he was in the gravelled part, she might be held liable; but they occurred because he was in too great a hurry to return to the paved portion and unnecessarily got in front of the advancing cars.

An appeal by the defendant Tatisich in the three actions from the judgment of WRIGHT, J. (21st November, 1928), in favour of the plaintiffs for the recovery of damages in respect of injuries sustained by them in a collision of motor-vehicles upon a highway.

The following statement is taken from the judgment of MIDDLETON, J.A.:—

These actions arose out of a collision between automobiles upon the highway between Hamilton and Niagara, occurring on

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the 12th August, 1928, a Sunday, in the afternoon, when there was much traffic both to and from Hamilton.

Mrs. Tatisich was driving her car westerly along the northerly side of the highway, preceded and followed by many cars. On the southerly side of the highway there was an almost continuous stream of cars passing in the opposite direction. Perceiving a small break in this opposing line of traffic, she apparently conceived the idea of passing the cars immediately in front of her, or at any rate of obtaining such a place that she could better her position. She therefore turned southerly out of her line of traffic. Edwards, who was driving a car in an easterly direction and was not far from where Mrs. Tatisich turned out, thought that a head-on collision was probable as a result of her conduct. To avoid this, he swerved his car to the south upon the gravel-strip of the road, at this point some 15 feet wide, and so passed her without injury. Almost immediately ahead of him, this gravel-strip was broken by a deep ditch. To avoid this, he turned back upon the highway, but unfortunately did not succeed in regaining his place in the east-bound line of traffic, but swung so far over, or his car skidded in such a way, that he was brought into impact with two cars proceeding westerly.

Actions resulted and were tried before Mr. Justice Wright on the 19th, 20th, and 21st November, 1928, resulting in a judgment in which, upon great conflict of evidence, he found that the whole disaster resulted from the misconduct of Mrs. Tatisich, and so awarded judgment against her in favour of all those injured in the accident, including Edwards. He exonerates Edwards from negligence and finds "that, while Edwards did not do the best thing in order to avoid the accident, he acted reasonably, and the entire accident was caused by the action of the defendant in turning over to the south side of the road. I quite realise that, if Edwards had put on the brakes when he was off the pavement, he could have brought his car to a stop, but the emergency or the occasion for his doing so had not arisen, and his act in coming back to the pavement and turning sharply to the right I cannot find to be negligence under all the circumstances of the case. He did not act unreasonably in what he did and is not chargeable with any negligence causing the accident, but was virtually an involuntary agent. The accident happened while he was labouring under the effects of the negligence of the defendant Tatisich." At another place the learned Judge remarks: "I am not at all sure that he, Edwards, retained the full possession of his faculties as he said he did. I think the very fact that the car was

turned suddenly out in front of him would unnerve him to some extent and that he was not in a frame of mind to do the very best or skilful or proper thing in order to avoid injuring either his passengers or the automobiles that were proceeding westerly."

March 26 and 27. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and MIDDLETON, J.J.A.

D. L. McCarthy, K.C., and *J. C. Elgie*, for the appellant. Although she was negligent in the first instance, her negligence was spent by the time Edwards got back on the highway. Edwards was negligent in accelerating his speed to regain the pavement. That negligence was the sole cause of the injury to the plaintiffs. In view of the approaching traffic, what Edwards did was gross negligence and was in no way connected with what he had had to do 50 or 100 feet back because of the act of the appellant.

C. W. R. Bowlby, for Edwards, respondent. He did what he thought was best; and, although it may not in fact have been best, yet, having been placed in an emergency and position of danger by the action of the appellant, he cannot be held liable for what he did or did not do: *Rowan v. Toronto Railway Co.* (1899), 29 Can. S.C.R. 717, at p. 723; *Engel v. Toronto Transportation Commission* (1926), 59 O.L.R. 514; *Blair v. Grand Trunk Railway Co.* (1923), 53 O.L.R. 405, at p. 410; *Claxton v. Hamilton Grimsby and Beamsville Electric Railway Co.* (1927), 32 O.W.N. 256; *Capital Trust Corporation v. Fowler* (1926), 50 O.L.R. 48; *Salmond on Torts*, 7th ed., pp. 37, 38, 39; *Halsbury's Laws of England*, vol. 21, paras. 760, 647, 648, 649.

H. J. McKenna, for the plaintiffs Harding *et al.*, respondents, and *W. Gay*, for the plaintiff Gall, respondent, referred to the evidence and asked for judgment against Edwards if Tatisich should be held not liable.

April 23. HODGINS, J.A.:—The defendant Tatisich, going west in her car and desiring to get on faster than the rest of the motors moving ahead in the same direction as she was going, turned out to pass the car in front of her, and in so doing forced Edwards, who was coming from the west, to turn to his right and get on the 15-foot strip next to the paved highway in order to avoid a head-on collision. The result was that, while going, as he admits, at the rate of 35 miles per hour, he found, within a very short period of time, that unless he got back to the paved roadway at once he would collide with posts placed on the strip close to the edge of the pavement or run into a deep ditch which ran through the 15-foot strip ahead of him.

The distance he traversed within which he had to decide what

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he would do is given by the learned trial Judge as from 30 to 90 feet. In my view, 45 feet is more nearly correct. Even in 90 feet he would reach the ditch in less than 2 seconds. In that distance and time, and under the entirely unexpected movement of Mrs. Tatisich, Edwards had to do the best he could; and, although he says he kept control of himself, I agree with the trial Judge that he over-estimated his coolness. His turn on to the pavement and his speed in crossing it indicate a quickening of his car, and can, I think, be accounted for only by an involuntary and perhaps unconscious movement accelerating his pace, or by the necessity of overcoming the resistance of the edge of the pavement which when surmounted would cause his car to move with great rapidity over its level surface; hence I cannot convince myself that he was sufficiently recovered from the shock of the emergency to be judged by standards involving deliberation and opportunity for conscious decision, or by what is called by Lord Sumner "nice judgment and prompt decision." *S.S. Singleton Abbey v. S.S. Paludina*, [1927] A.C. 16, 26. In *Admiralty Commissioners v. S.S. Volute*, [1922] 1 A.C. 129, 136, Lord Birkenhead, to my mind, describes such a situation:—

"A.'s negligence makes collision so threatening that though by the appropriate measure B. could avoid it, B. has not really time to think and by mistake takes the wrong measure. B. is not held to be guilty of any negligence."

Counsel for Mrs. Tatisich admitted that it was owing to her negligence that Edwards was forced off the road, but contended that, while liable to him for the consequences of that negligence, she was not responsible to others who suffered, as she contended, from negligence due to Edwards's action subsequent to his being driven on the 15-foot strip.

Owing to the admission by counsel that Mrs. Tatisich was guilty of negligence, as I have mentioned, we are relieved, as is stated by Sir Samuel Evans, President of the Admiralty Division, in *H.M.S. London*, [1914] P. 72, 76, from the necessity of considering in a chain of causation one of the elements in legal liability, namely, the foresight or anticipation of the reasonable man. This view is founded upon the judgment of Channell, B., in *Smith v. London and South Western Railway Co.* (1870), L.R. 6 C.P. 14, 21, where he says:—

"Where there is no direct evidence of negligence, the question what a reasonable man might foresee is of importance in considering the question whether there is evidence for the jury of negligence or not, and this is what was meant by Bramwell, B., in his

judgment in *Blyth v. Birmingham Waterworks Co.* (1856), 11 Ex. 781, 25 L.J. Ex. 212, 105 R.R. 791, referred to by Mr. Kingdon; but when it has been once determined that there is evidence of negligence, the person guilty of it is equally liable for its consequences, whether he could have foreseen them or not."

Both in *Weld-Blundell v. Stephens*, [1920] A.C. 956, 983, 984, and *In re Polemis and Furness Withy & Co.*, [1921] 3 K.B. 560, 569, this statement of the law is approved and followed.

In the *Paludina* case, already referred to, that ship was, by the weight of the wind, forced from her moorings at the quay and fouled the *Singleton Abbey*, which ran against the *Sara*. For these successive accidents the *Paludina* was held to blame. But for a subsequent collision, between the *Singleton Abbey* and the *Sara*, she was absolved, because the *Singleton Abbey*, when the *Sara* bore down upon her again, had, according to her captain, got into a satisfactory position and was free from what caused her original movement from the quay into the harbour, and had then deliberately taken action to avoid the *Sara*, which, as it happened, broke the propeller of the *Singleton Abbey*. Lord Sumner arrives at his judgment in this way ([1927] A.C. at p. 28):—

"I do not mean that Captain Hughes (of the *Singleton Abbey*) was negligent, but that he miscalculated his action. Still his action was his own. No part of it was a 'natural' consequence of the *Paludina's* action, except in a sense that would make negligence on his part also a 'natural' consequence. His action was wilful, and, though rapid, was deliberate. The *Paludina's* negligence did not make him take it. Cause and consequence in such a matter do not depend on the question, whether the first action, which intervenes, is excusable or not, but on the question whether it is new and independent or not."

In the case at bar there is no new or independent action by any one, and the collisions between Edwards's car and the two with which he came into contact occurred while "the hand of the original wrongdoer was still heavy" on him.

It is a satisfaction to be able to come to this conclusion, for the whole series of catastrophes was due to Mrs. Tatisich's unnecessary haste and callous disregard of the safety of others, in turning out to pass the car in front of her, contrary to the Highway Traffic Act, R.S.O. 1927, ch. 251, Part VII., sec. 35 (10), in that "the portion of the highway in front of and to the left of the vehicle to be passed" was not "safely free from approaching traffic."

That there is liability for all the damages which flowed in

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sequence from the initial wrongful act of Mrs. Tatisich is quite clear. And the aggregate of the damages, however large, is of no consequence in considering the question of liability: the *Polemis* case (*supra*).

That case has attracted much attention, as the fall of a board into the hold of the vessel, due to the negligence of an Arab stevedore, caused a fire by igniting petrol vapour and thereby rendered the charterers liable for some £200,000. The decision itself puts an end to the rule that it is only the natural and probable consequences of his action for which a wrongdoer is liable. In its place is established the principle that, while the probability of evil consequences is material in determining whether the defendant was negligent or not, that is, whether he was guilty of want of reasonable care according to the circumstances, he is liable for those consequences whether probable or not.

Although not yet reviewed by the House of Lords, it may be mentioned that Lord Warrington of Clyffe was a party to the *Polemis* case, which has been followed by Atkin, L.J. (now Lord Atkin), in *Hambrook v. Stokes Brothers*, [1924] W.N. 296, and that in the *Paludina* case Lord Dunedin considered that the *Paludina* was liable for the final collision between the *Singleton Abbey* and the *Sara*, which the majority of the House thought had been severed from the rest of the damages by the new and independent act of the captain of the *Sara*.

I would dismiss the appeal.

MULOCK, C.J.O.:—I agree.

MIDDLETON, J.A. (after setting out the facts as above):—Having listened attentively to the forcible arguments presented to us and carefully reviewed the evidence, I am satisfied that the case must be determined on the facts as found by the learned trial Judge.

Whatever doubt might have existed as to the defendant's liability for this entirely unexpected result of her negligence and misconduct, the law is now clearly settled by the decision of the Court of Appeal in England in the case of *In re Polemis and Furness Withy & Co.*, [1921] 3 K.B. 560, which, as Sir Frederick Pollock remarks, *Torts*, 12th ed., p. 31, is "the law in England, subject to review only in the House of Lords." If it be proved that a wrongful act was the direct cause of the *damnum complained of*, there is a right to recover. Liability ceases only when some new factor intervenes which is unconnected with the original culpable act or default.

Although this decision was regarded as revolutionary, it has apparently been accepted by the Courts without challenge, while much criticised in other quarters.

Lord Justice Atkin in *Hambrook v. Stokes Brothers*, [1925] 1 K.B. 141, 156, says: "The full effect of the decision in *In re Polemis and Furness Withy & Co.* has not yet, I think, been fully realised, even though that case laid down no new law." Most will, I think, conclude that even if the case did not lay down new law it certainly rendered obsolete the many decisions in which the question of proximate cause had been laboriously discussed.

The Privy Council in *Dominion Natural Gas Co. v. Collins*, [1909] A.C. 640, has stated the law in much the same terms; although perhaps the decision might have been taken to be confined to cases in which the accident arose from the storage or handling of things dangerous in themselves, yet these statements must now be regarded as of universal application. When once it is found that the thing complained of was the result of the negligence of the defendant, the defendant is liable unless he can "shew affirmatively that the true cause of the accident was the conscious act of another volition."

That which had been in earlier cases indicated as exonerating the defendant from liability, that the damage was too remote because it could not reasonably have been anticipated as a consequence of the wrongful act done, can no longer be urged as a defence. The causal connection in the *Polemis* case was clearly shewn, but the *damnum* would not have resulted had there not been a most extraordinary and unforeseeable concurrence of contributing factors. None of these factors in that case was the conscious intervention of a third party. The Court adopted as the basis of its decision what had been said by Lord Sumner in the case of *Weld-Blundell v. Stephens*, [1920] A.C. 956, at p. 984: "What a defendant ought to have contemplated as a reasonable man is material when the question is whether or not he was guilty of negligence. . . . This, however, goes to culpability, not to compensation;" and by Sir Samuel Evans in *H.M.S. London*, [1914] P. 72, at p. 76: "The Court is not concerned in the present case with any inquiry as to the chain of causes resulting in the creation of a legal liability from which such damages as the law allows would flow. The tortious act—i.e. the negligence of the defendants which imposes upon them a liability in law for damages—is admitted. This gets rid at once of an element which requires consideration in a chain of causation in testing the question of legal liability, namely, the foresight or anticipation of the reasonable man . . . When it has been once determined that there is evidence of negligence, the person guilty of it is equally

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liable for its consequences, whether he could have foreseen them or not."

I would refer to an earlier decision of Lord Sumner, when he was Lord Justice Hamilton, in *Latham v. R. Johnson & Nephew Ltd.*, [1913] 1 K.B. 398, where he says at p. 413: "Children acting in the wantonness of infancy and adults acting on the impulse of personal peril may be and often are only links in a chain of causation extending from such initial negligence to the subsequent injury. No doubt each intervener is a *causa sine qua non*, but unless the intervention is a fresh, independent cause, the person guilty of the original negligence will still be the effective cause." (His Lordship adds): "If he ought reasonably to have anticipated such interventions and to have foreseen that if they occurred the result would be that his negligence would lead to mischief." This last paragraph must be regarded as no longer the law in view of the decision of the *Polemis* case. I quote it merely to shew his view as to the nature of an intervening cause which will relieve from liability.

The decision of the House of Lords in the *Paludina* case, [1927] A.C. 16, is of the greatest importance. A very awkward situation had arisen as the result of the misconduct of a ship. The captain of another ship in danger, not acting in the agony of collision, failed to stop his engines as the result of a miscalculation. The question was whether this failure to stop the engines broke the chain of causation in such a way as to free the original wrongdoer from the consequences of his wrongdoing. There was great diversity of judicial opinion, the decision of the Court of Appeal being affirmed in the Lords by a division of three to two. Lord Sumner states the situation thus (pp. 26 and 27): "The *Singleton Abbey* herself is the cause of the damage she has suffered, not merely if her captain's action brought it about negligently. She will be the cause of that damage if her captain, freely and as the direct consequence of his own decision, brought it about at all." After examining the facts his Lordship continues (p. 28): "His action was wilful, and, though rapid, was deliberate. The *Paludina's* negligence did not make him take it. Cause and consequence in such a matter do not depend on the question, whether the first action, which intervenes, is excusable or not, but on the question whether it is new and independent or not. . . . I am not able to accept the proposition, that the *Paludina* put the *Singleton Abbey* in such a position of alternative danger, that her captain's 'not unnatural' action does not break the chain of causation between the *Paludina's* bad management and the *Singleton Abbey's* revolving propeller, or the proposition that "when a

man by his wrongful act has caused impending damage to the property of another and that other can only save himself by passing on the injury to a third, this third person can recover his damages from the original wrongdoer." The question in his Lordship's view was (p. 30): "Has the *Singleton Abbey* proved the *Sara* to have been free from blame, and therefore a mere link in the chain of causation between the *Paludina*'s blunder at 11 a.m. and the error in judgment of the captain of the *Singleton Abbey* at 11.20? . . . He had time enough, though short, in which to decide, and without saying he was to blame, he was, on his own shewing, just a little too sanguine. There was nothing merely instinctive about his action, it was deliberate and it was almost right."

In other words, the case is not brought within the decision in *The City of Lincoln* (1889), 15 P.D. 15, as it was not shewn that "the hand of the original wrongdoer was still heavy on his ship and his own navigation was not the sole human agency determining her fortunes;" see [1927] A.C. at p. 27.

The dissenting view was (*per* Lord Dunedin at p. 23) that the action of the captain was not "to be attributed to him as a fault; he was in a position of danger; it was a position in which you had placed him, and it ought not to be attributed to him as a fault or as an act of negligence, and, under those circumstances, the chain is complete." What was done by her captain was in the course of a struggle to extricate her from a dangerous position in which she had been put, and "the result is inevitable that the chain of causation from the original fault remains unbroken."

Further light is shed upon the problem by the Scotch case *Canadian Pacific Railway Co. v. Kelvin Shipping Co. Ltd.* (1927), 138 L.T.R. 369. The owners of the boat in question, while admitting initial liability for the collision and for damage truly consequent thereon, alleged that the damages claimed were to a large extent due to the subsequent negligence on the part of the respondents. It was held by the majority of the Lords, the case again being a divided opinion of three to two, that there was no breach in the chain of causation initiated by the original collision, and no *novus actus interveniens* which was the direct cause of the final damage. The burden of shewing that the chain of causation started by the initial injury had been broken lay on the appellants. In order to discharge that burden they must prove that the breach in the chain was due to unwarrantable action and not merely to action on erroneous opinion by people who had *bonâ fide* made a mistake while trying to do their best, which was all that was known to have happened in the case in hand.

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The case emphasises the necessity of charity in judging the conduct of one who is not, it is true, in the actual agony of collision, but upon whom, in the language I have already quoted, "the hand of the original wrongdoer was still heavy," before his conduct can be regarded as the act of a conscious intervening agent. If in truth such a one is "acting on the impulse of personal peril" he may yet be "only a link in a chain of causation extending from the initial negligence to the subsequent injury," to quote again the words of Hamilton, L.J., in *Latham v. R. Johnson & Nephew Ltd.*

The case now in hand comes extraordinarily close to the line. The learned trial Judge has realised this, and yet has decided in favour of the plaintiffs, refusing to accept to its full extent the statement made by Edwards as to his own mental condition, and concluded from the whole evidence that the chain of causation was not in truth broken, and I am, as already indicated, unable to say with any degree of certainty that that conclusion is wrong. It follows that the appeal must be dismissed.

MAGEE, J.A.:—In these cases, with much respect, I am unable to agree that the defendant Tatisich was liable to any of the plaintiffs. She was guilty of negligence in turning to the left in front of Edwards, and thus forcing him from the paved roadway on to the gravelled part of the road at his right; and, had the ultimate collisions occurred immediately after and while he was in the gravelled part, she might very properly be held liable; but they occurred, as I venture to conclude, because he was in too much of a hurry to return to the paved portion, and unnecessarily got in front of the advancing motors, and the same accident might well have occurred in the same way if he had driven for a quarter of a mile after being forced out of his path by Mrs. Tatisich.

The gravelled part of the road was a perfectly good one, and the ditch which began on the east side of the road leading south to the gravel-pit was in no sense so near as to cause an emergency. He might well have stopped or slowed down. He was, in my view, too anxious to get back to the middle paved part, and he should not have got in the way of the other traffic.

The defendant Tatisich's negligence was perhaps a *causa sine qua non*, but I submit in no sense a *causa causans*. Edwards himself disclaims any loss of intellect, and I cannot see that the occasion required turning off the gravel at all unless to assert his right to do so.

I would allow the appeal.

Appeal dismissed (MAGEE, J.A., dissenting.)

[APPELLATE DIVISION.]

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Insurance (Automobile)—Right of Action of Person Injured by Automobile against Insurer of Owner—Insurance Act, R.S.O. 1927, ch. 222, sec. 85—Intra Vires—Conditions—Automobile Driven by Boy over 16 but under 18—“Age-limit”—Absence of Licence—Highway Traffic Act, R.S.O. 1927, ch. 251, secs. 16, 43, 66, 69—Damages—Costs of Former Action.

Section 85(1) of the Insurance Act, R.S.O. 1927, ch. 222, which enables a person who has recovered a judgment for injury or damage to his person or property, an execution upon which judgment has been returned unsatisfied, to sue the company which has insured the judgment debtor against liability for such injury or damage, and to recover an amount not exceeding the face amount of the policy or the amount of the judgment in the same manner and subject to the same equities as the insured would have had if the judgment had been satisfied, is not, as applied to an insurance company incorporated under Dominion legislation, *ultra vires* of the Ontario Legislature.

The statutory action is in effect a mode of equitable execution based upon the original judgment.

The plaintiff, suing an insurance company under sec. 85(1), proved a judgment obtained against S. in an action for damages for injury caused to the plaintiff by the operation of S.'s motor-vehicle upon a highway and was met with the defence that when the vehicle injured the plaintiff it was being driven by S.'s son, who was at the time over 16 years of age but under 18, contrary to statutory condition 5, which provides that the insurer shall not be liable upon the policy while the vehicle, with the knowledge, consent or connivance of the assured, is being driven by a person under the “age-limit fixed by law.”

Held, by MULOCK, C.J.O., that, under sec. 43(1) of the Highway Traffic Act, R.S.O. 1927, ch. 251, 16 years is the only age-limit fixed by law, and there was no violation of the statutory prohibition.

Per MAGEE and HODGINS, J.J.A.:—The evidence and the admissions of counsel established that the injury was of a nature covered by the policy, and that S.'s son, a lad of 16 years, was driving the vehicle at the time of the accident without a licence, but there was no proof that he was doing so to the knowledge or with the consent or connivance of S.

The judgment in the action of Y. v. S. was not, as against third parties, evidence in respect of the circumstances upon which it was founded (*Allan v. McTavish* (1883), 8 A.R. 440); and the facts stated in the reasons for the judgment of the Court in Y. v. S. were not evidence against third parties; consequently, the judgment against S. carried with it no presumption or proof of the fact that she had knowledge of or had given consent or had connived with her son in his driving of the vehicle.

Under sec. 43 of the Highway Traffic Act, 18 years is an age-limit fixed by law, as well as 16 years. The 16-year old driver was under the age-limit of 18 years “fixed by law;” and, in the absence of proof that he was driving with the knowledge, consent or connivance of his mother, the defendants, the insurance company, were liable.

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Sections 16, 43, 66, and 69 of the Highway Traffic Act, considered.
Per MIDDLETON, J.A.:—It was unlawful for the son to operate the car, but that was because he had no licence, not because of his age. The licence required in the case of a person over 16 and under 18 is a different licence from that required in the case of a person over 18, but 18 cannot be said to be a limit prescribed by law for the operation of a motor-vehicle, while 16 is such a limit.
Per Curiam: The judgment against the insurance company rightly included all costs awarded to the plaintiff in the original action; and that judgment should be in all respects affirmed.

AN appeal by the defendants from the judgment of RANEY, J., at the trial (29th November, 1928), in favour of the plaintiff (Jeanne Yorke) in an action brought by her under sec. 85 of the Ontario Insurance Act, R.S.O. 1927, ch. 222, to recover from the defendants, an insurance company, the amount of an unsatisfied judgment recovered by her against one Elizabeth Schwartz, who was insured by the defendants against liability for bodily injuries or death caused to a person by reason of the operation of her (Elizabeth Schwartz's) motor-car.

January 31. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and MIDDLETON, J.J.A.

R. S. Robertson, K.C., and *J. P. Walsh*, for the appellants. Section 85 of the Insurance Act, R.S.O. 1927, ch. 222, under which the action is brought, is *ultra vires* of the Provincial Legislature. It is an effort by the Province to attach to a company operating under a Dominion licence a greater liability than allowed under the Dominion statute: *Citizens Insurance Co. of Canada v. Parsons* (1881), 7 App. Cas. 96; *Re Insurance Contracts* (1926), 58 O.L.R. 404. The learned trial Judge erred in finding that the "age-limit fixed by law," the phrase used in statutory condition 5, is 16 years (see sec. 43 of the Highway Traffic Act, R.S.O. 1927, ch. 251). The age-limit is 18 when no licence has been obtained. The insurance contract provides that the company shall be liable for costs only if it has defended. The company should therefore not be held liable for costs in this case.

Gideon Grant, K.C., for the plaintiff, respondent. The learned trial Judge was right in his interpretation of "age-limit fixed by law." Below 16 years the statute contains a prohibition of driving, but between 16 and 18 years the statute merely imposes certain regulations: *Brock v. Travellers Insurance Co.* (1914), 88 Conn. 308, at p. 311; *Morrison v. Royal Indemnity Co.* (1917), 180 N.Y. App. 709. The company failed to prove in any event that the son, even though under the age-limit, was driving with the insured's knowledge or consent. It is the duty of the company to pay the costs of the defence which they refused to undertake.

Edward Bayly, K.C., for the Attorney-General for Ontario, Section 85 is so obviously within the heads of property and civil rights and administration of justice, both of which are assigned by the British North America Act to the Provincial jurisdiction, that it can only be displaced by very strong Dominion legislation. The difficulty of making annual returns is not a sufficient ground to invalidate it.

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April 23. MULOCK, C.J.O.:—The defendant company issued a policy of insurance in favour of Elizabeth Schwartz, the owner of an automobile, insuring her to the extent of \$5,000 against liabilities for bodily injuries or death caused to a person by reason of the operation of her automobile. Her son, whilst driving the automobile, injured the plaintiff, who brought an action for damages against Elizabeth Schwartz and her son, and obtained judgment against them for \$2,067.25 and costs which were taxed and allowed at \$633.40: *Yorke v. Schwartz* (1927), 32 O.W.N. 329, 33 O.W.N. 142. She then caused execution to be placed in the Sheriff's hands for the amount of the judgment and costs, but the writ was returned *nulla bona*. Thereupon the plaintiff brought this action under the provisions of R.S.O. 1927, ch. 222, sec. 85, which gives the plaintiff a right of action against the defendant company in respect of her judgment against Elizabeth Schwartz and her son. The case was tried by Raney, J., who gave judgment in favour of the plaintiff, and from such judgment the defendant company appeals.

The sole defence is that, when the car injured the plaintiff, it was being driven contrary to one of the statutory conditions, which reads as follows:—

“The insurer shall not be liable under this policy while the automobile, with the knowledge, consent or connivance of the insured, is being driven by a person under the age-limit fixed by law, or, in any event, under the age of sixteen years, or by an intoxicated person.” R.S.O. 1927, ch. 222, sec. 175, condition 5.

Elizabeth Schwartz's son at the time of the accident was over the age of sixteen and under the age of eighteen years. Section 43 (1) of the Highway Traffic Act, R.S.O. 1927, ch. 251, is as follows:—

“No person under the age of sixteen years shall drive or operate a motor-vehicle, and no person over the age of sixteen years and under the age of eighteen years shall drive or operate a motor-vehicle on the highway unless and until such person has passed

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an examination and obtained a licence as provided by section 16 of this Act."

In my opinion, sixteen years is the only age-limit fixed by law. Any one under that age is absolutely prohibited from driving a motor-vehicle. Above that age it is lawful for him under certain circumstances to drive a motor-vehicle. The driver of the automobile at the time of the accident in question being over the age of sixteen years, there was no violation of the statutory prohibition.

I therefore think the appeal should be dismissed with costs.

HODGINS, J.A.:—Appeal by the defendants from the judgment of Mr. Justice Raney, delivered on the 29th November, 1928, directing payment to the plaintiff of the sum of \$2,826.55 and costs.

The action is brought by the plaintiff, an execution creditor of one Elizabeth Schwartz, who was insured by the defendants to the extent of \$5,000 against liability for bodily injuries or death caused to one person by reason of the operation of the insured's motor-vehicle.

The action is brought under the Insurance Act, R.S.O. 1927, ch. 222, sec. 85 (1), which reads as follows:—

"In any case in which a person insured against liability for injury or damage to persons or property of others has failed to satisfy a judgment obtained by a claimant for such injury or damage and an execution against the insured in respect thereof is returned unsatisfied, such execution creditor shall have a right of action against the insurer to recover an amount not exceeding the face amount of the policy or the amount of the judgment in the same manner and subject to the same equities as the insured would have if the said judgment had been satisfied."

This section has been in force since 1924.

Shortly after the trial opened, this conversation occurred between the learned Judge and Mr. Grant, K.C., counsel for the plaintiff, and Mr. Walsh, counsel for the defendants.

RANEY, J.: Does that mean that the plaintiff will have to make her case over again?

Grant, K.C.: Oh, no; she sues on the judgment.

RANEY, J.: The insurance company have an opportunity to come in, and they are practically precluded by the judgment.

Grant, K.C.: Yes, my Lord.

Walsh: Yes, nothing turns on that; I am ready to admit all that.

Later on the following took place:—

Grant, K.C.: Then I put in the policy which my friend was good enough to let me have, the policy in which Mrs. Schwartz is insured by the defendant company, the Continental Casualty Company. Perhaps I ought to read something of that:

"The Continental Casualty Company . . . in consideration of the premiums herein provided, and of the statements forming a part hereof, do hereby agree to indemnify the insured, herein-after named and designated as such, against loss arising from the perils specifically insured against, as hereinafter set forth, in respect to the automobile described in the statements of this policy (hereinafter referred to as the automobile), subject to the exclusions and conditions contained herein or such other exclusions or conditions as may be endorsed hereon.

"The following is a copy of the application."

Then it sets out the application.

The perils insured against are—I will just read the one—liability for bodily injuries or death, that is, to some person injured by this automobile, to one person \$5,000. This was one person, so their limit was \$5,000.

Raney, J.: What is their reason for repudiating liability? What bearing does that have on the statute? Must you not try that question as to whether or not the assured is entitled against the insurance company by reason of some default?

Walsh: I think not, my Lord. Until the insurance company is in the action at the behest of the assured, no judgment could be given in the original action that would bind the insurance company or preclude us from raising that point.

Grant, K.C.: What I am doing now is shewing that this defendant has a contract of indemnity by this insurance company in respect of this damage. Now, if they have any defence to that, that is on them, not on me. All I do is, shew that they have the indemnity, and this is the policy by which they agree to indemnify her, and there I rest my case.

(Exhibit 5: Continental Casualty Company, policy No. C.J. 36347, to E. Swartz.)

Grant, K.C.: That is my case, my Lord. I need not shew, I suppose—the presumption is that it is not paid, because the return is *nulla bona* on the writ. It has not been paid. My friend admits that, I think.

Walsh: Yes, I admit that.

Raney, J.: Of course, any defence the insurance company has against the assured—

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Grant, K.C.: Is good against us.

RANEY, J.: Is available to him in this action.

Grant, K.C.: Is good against us, yes. It is up to them now to shew that they have one.

I think the effect of what I have quoted is that the defendants' counsel intended to admit that the judgment in *Yorke v. Schwartz* was for an injury within the description of the perils insured against, while both parties agreed that the defence set up before us, based on statutory condition 5, was open to the defendants.

The defendants then proved the age of A. E. Schwartz, the driver of the car, to have been, at the time of the accident, 16 years and 2 weeks. Whether he was driving without a permit and without the consent of his mother, Elizabeth Schwartz, is thus dealt with at the trial:—

RANEY, J.: Is it conceded that he had no permit?

Grant, K.C.: No, no, that is not conceded. I don't know whether he had or not.

Walsh: Oh, yes, it was in the action. That was found by the learned trial Judge in the other action, therefore I say it is *res judicata* now, and my friend cannot raise that at this point.

RANEY, J.: What was found?

Walsh: That he was driving without a permit, and without examination. The reasons for judgment of Mr. Justice Riddell are reported in 32 O.W.N. 14, *Yorke v. Schwartz*. Certain findings were made by the trial Judge in that action; I take it that that is a matter of which your Lordship may take judicial notice.

Grant, K.C.: I don't agree with that, but I don't know whether it makes any difference in this case or not.

Walsh: At all events, my friend took his judgment against the mother of the boy, who was the owner of the car, and of course if he had been driving without her consent that judgment would never have been given; but, at all events, I think—

Grant, K.C.: I don't admit that at all.

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Walsh: I suppose my learned friend wants to get down to what is the real contest in this trial. The real contest is that we say that under the provisions of this policy, statutory condition No. 5, we are relieved from liability, because the boy who was driving the car was of an age permitted by law to drive the car, and if your Lordship will turn to the policy which is in as an exhibit, I have a copy here—

RANEY, J.: He was of the age for a permit?

Grant, K.C.: He was of the age for a permit, yes; that makes no difference, under the cases.

Walsh: Well, with respect, I think it does.

Raney, J.: Do you admit, Mr. Grant, that there was no permit and that the boy was driving with the consent of the mother?

Grant, K.C.: No, I do not admit that he was driving with the consent of the mother. I admit there was no permit.

Walsh: I don't know that it is material in this action, my Lord. We are not depending on that in this action; we are depending on the statutory condition, that he was not of age—

Raney, J.: Well, supposing he was driving without the mother's consent.

Walsh: Well, my Lord, I subpoenaed the mother as a witness, and she is supposed to be here this morning.

Walsh: I say, my Lord, that they are estopped now from saying that the boy was not driving with the consent of the mother, because they have taken their judgment against him, and they have sought to enforce it against him.

Grant, K.C.: That was not at issue at all in the other action.

Walsh: I think it was.

Grant, K.C.: Well, look at the pleadings and you will see what was at issue.

Walsh: I was not at the trial of the other action.

Grant, K.C.: Well, I have the pleadings here, and you can see them if you want to.

Raney, J.: Well, do you want to offer any evidence?

Walsh: I would if there was any contest about that, my Lord.

After an adjournment to enable counsel for the defendants to call the mother, he addressed the Judge in the following way:—

Walsh: My Lord, since the adjournment I have looked into this matter a little further. I do not think that I am called upon to call this witness.

Raney, J.: Well, don't argue it now, but make your own case in your own way, and then we will get to the argument.

Walsh: Well, I am going to say, my Lord, I am going to rely on sec. 41 of the Act.

Raney, J.: Then you are closing your case?

Walsh: Yes, my Lord.

Raney, J.: You are closing your case where it is?

Walsh: Yes, my Lord.

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As the result of the above, the evidence and the admissions made by counsel resolve themselves into this: that the accident was of a nature covered by the policy, and that A. E. Schwartz, whose age was established as being between 16 and 18, was driving the car at the time of the accident without a licence, but that there was no proof that he was doing so to the knowledge or with the consent or connivance of his mother, Elizabeth Schwartz.

The assumptions (1) that the judgment in *Yorke v. Schwartz* was conclusive on the defendants here as to the injury being within the indemnity agreed to be given by the policy, and (2) that because certain facts were stated in the reasons for the judgment of the Divisional Court as having been proved at the trial they must be taken as established as against the defendants in this action, are both erroneous. But the first assumption was implemented by agreement, as I have said. The second was not concurred in and is contrary to what has been decided some years ago in this Court and elsewhere at an earlier date.

Only the formal judgment in *Yorke v. Schwartz* was actually put in evidence. As pointed out by Mr. Justice Burton in the Court of Appeal many years ago, in *Allan v. McTavish* (1883), 8 A.R. 440, a judgment is not evidence against third parties in respect of the circumstances upon which it is founded, but only of the relationship of the parties, namely, debtor and creditor, and the amount of the debt and the date of its recovery. In that case the plaintiff, as assignee of a mortgage made by the grantor, sued as an execution creditor to set aside a fraudulent conveyance to the grantor's sons. He put in his original judgment against the grantor. The crucial point in the case was whether that judgment established the fact that the plaintiff was a creditor at the time of the fraudulent conveyance. But the Court pointed out that the judgment carried with it no proof, nor did it establish any estoppel on the point that he was a creditor at the time the conveyance was made.

It was contended here that Elizabeth Schwartz could only have been held liable as owner if the car was being driven with her consent by her son, and if he was in fact without a licence. But, even if, on consulting the reasons given for the original judgment, or those in the Court of Appeal, it appears that these facts were in issue and were proved against Elizabeth Schwartz, this would not advance the matter, because as I have said these reasons are not themselves evidence against a third party nor is the judgment itself any proof of them. The defendants were no parties to the original action or judgment nor in privity with either party to it.

Consequently, the judgment against Elizabeth Schwartz carried with it no presumption or proof of the fact that she had knowledge of or had given consent or had connived with the prohibited person in his driving of the car. The defendants must, therefore, fail if the young man was in fact one within the class described in statutory condition 5, that is, "under the age-limit fixed by law."

The learned trial Judge has, in his reasons, come to the conclusion that the only age-limit fixed by law in the Province of Ontario is the limit of 16 years (sec. 44 of the Highway Traffic Act, 1923, now part of sec. 43 of ch. 251 in the R.S.O. 1927). I refer for convenience to the R.S.O. 1927, the previous sections being set out in the judgment referred to by the Judge as containing his reasons for his conclusions in this case).* The statutory condition No. 5 relied on by the defendants is as follows:—

"The insurer shall not be liable under this policy while the automobile, with the knowledge, consent or connivance of the insured, is being driven by a person under the age-limit fixed by law, or, in any event, under the age of 16 years, or by an intoxicated person."

The learned trial Judge, I think, correctly summed up the various provisions of the Highway Traffic Act, as follows:—

"The cumulative effect of secs. 43, 16, and 66, as it seems to me, is:—

"(a) that no one under the age of 16 shall drive a motor-vehicle on a highway;

"(b) that no one above that age, and under the age of 18, shall drive a motor-vehicle on a highway unless he holds a chauffeur's licence;

"(c) that no one above the age of 16, of whatever age, shall drive a motor-vehicle on a highway unless he holds either a chauffeur's licence under sec. 16, or an operator's licence under sec. 66;

"(d) that no one shall employ any one to drive a motor-vehicle who is not a licensed chauffeur;

"(e) that any one above the age of 16 may be a licensed chauffeur if he secures the certificates called for by subsec. 4 of sec. 16, and if these certificates are implemented by the issuance of a licence" (*Donald v. Lewis*, 63 O.L.R. at pp. 312, 313).

The only quarrel I have with his view is that I think 18 years is an age-limit fixed by law, as well as 16 years. In the latter case driving by any one within that limit is prohibited. Under 18 years and over 16, driving is permitted, but only when such person has passed an examination and has obtained a licence to

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drive, and I agree with Mr. Barron in his treatise on the Canadian Law of Motor-vehicles, at p. 105, where he says:—

“If such person is over 16 years of age, and under 18, and has not obtained a licence to drive and operate a motor-vehicle, then, as he is under the age-limit fixed by law, no liability can arise under a policy when the automobile is driven by such person.”

There was cited to the learned trial Judge and to us the case of *Brock v. Travellers Insurance Co.*, 88 Conn. 308, which he followed and approved. The judgment in that case was given by the Appeal Division in the Third Judicial District of Bridgeport, Conn. The Connecticut statute provided that no person should operate a motor-vehicle until he was licensed, and that no licence should be issued to an applicant unless he was over 18 years of age. That, it is said in the judgment, in effect fixes the age at which a person may operate a motor-vehicle at 18 years, but the section went on to provide that any person above the age of 16 years might operate a motor if accompanied by a licensed operator, and the view of the Court, having regard to these two provisions, may be gathered from the following extracts (pp. 310, 311, 312):—

“Our statutes do not in direct terms fix the age at which it shall be unlawful for a person to operate a motor-vehicle in the public highways.”

“The first part of this section, if taken by itself, in effect fixes the age at which a person may operate a motor-vehicle at 18 years; for it provides that none but a licensed operator may operate one, and that no person under the age of 18 years may obtain a licence. But the statute is to be interpreted as a whole, and the last part provides, in effect, that any person above the age of 16 years may operate such vehicle if accompanied by a licensed operator.”

“The statute unquestionably fixes 16 as the age under which a person may not in this State operate a motor-vehicle upon the highways. Under that age no person may operate such vehicle. Above that age any person may operate one if accompanied by a licensed operator, and, if licensed, he may, if qualified, after the age of 18 years, without being so accompanied.”

“The provision of the statute, that an unlicensed person operating a car must be accompanied by a licensed operator, has no relation to the age of the operator. It applies to the man of 70 as well as to the boy of 17. Neither may operate the car unless so accompanied, and, when so accompanied, either may, although unlicensed, operate it. If the operator is not so accompanied, the law in each case is violated, not because the operator is under the

age fixed by law for operating the car, but because of his non-compliance with the other provision of the statute."

The statute which that Court was discussing, therefore, provided that no person should operate a motor-vehicle on the highway unless licensed and that no licence should be issued, unless on satisfactory proof that the applicant was over 18 years of age. Then followed a proviso in these words:—

"Nothing herein contained shall prevent the operating of a motor-vehicle by an unlicensed person 16 years of age or more . . . if accompanied by a licensed operator."

It appears to me obvious that the reasoning of the Connecticut Court was based upon the fact that, provided the operator was 16 years of age or over, he could legally operate a motor, provided he was accompanied by a licensed operator. There was no age-limit expressed in that provision, so that no age-limit can be said to have been fixed by law other than 16 years of age, although no one could get a licence unless he was over 18 years of age. But a licence was not necessary, as I have said, to any one 16 years or over, provided he was accompanied by a licensed operator. Our statute, it appears to me, fixes an age-limit and makes 18 years that age-limit, because it provides that no one above 16 and under the age of 18 shall drive a motor-vehicle on the highway unless he holds a chauffeur's licence, although if above the age of 16 he may hold, instead of a chauffeur's licence, an operator's licence under sec. 66.

An operator, by sec. 1 (i) of the Highway Traffic Act, R.S.O. 1927, ch. 251, means "any person other than a chauffeur who operates a motor-vehicle on a highway." By sec. 66 of the same Act, power is given to the Minister of Highways to issue to persons, other than chauffeurs, a licence for such times and upon such terms and conditions and subject to such regulations and restrictions as the Lieutenant-Governor in Council may prescribe. These operators' licences cannot be granted to residents of other Provinces of Canada who do not reside and carry on business in Ontario for more than three consecutive months in each year, nor to residents of other countries or states who do not reside in Ontario for more than 30 days in any one year (sec. 69).

My reading of our Act, on a consideration of the various provisions quoted here and above, is that between the ages of 16 and 18 no one but a person equipped with a chauffeur's licence can operate a car upon the highway, and that this section is imperative as to the age-limit, and that the provision that no one above the age of 16, of whatever age, shall drive a motor-vehicle upon

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the highway unless he holds either a chauffeur's licence or an operator's licence, must, in the case of persons between 16 and 18 years of age, give way to the specific provisions regarding those under the age of 18, so that the powers of the Lieutenant-Governor in Council with regard to operators' licences must be exercised, subject to that restriction. It would be a rather extraordinary construction if it were held that the Lieutenant-Governor in Council was empowered to grant an operator's licence to a person between the years of 16 and 18 in the teeth of the provisions of sec. 43. It is, I admit, difficult to reconcile the various provisions I have already mentioned as set out by the learned trial Judge, but the difference between the *Brock* case and the case at Bar appears to rest upon the fact that here the age of 18 years is specifically mentioned as a limit under which a chauffeur's licence must be obtained in order to enable a person to operate a motor on a highway, and that in the *Brock* case there is no such limit of age specifically fixed under which it was unlawful to operate a motor-car. The fact that the Secretary of State in the *Brock* case was required to satisfy himself that the applicant was over 18 years is a limitation of his powers, but it is in no sense a fixing of 18 years as an age fixed by law for operating a motor, as our Act declares.

The case cited by Mr. Grant of *Morrison v. Royal Indemnity Co.*, 180 N.Y. App. 709, is not in point on the question raised here. It holds that, as in this case, the insurer can defend itself against liability under a clause in the policy which expressly provided that the insurer was not to be liable "in respect of injuries caused in whole or in part by an automobile while being driven or manipulated by any person in violation of law as to age, or, if there is no legal age-limit, under the age of sixteen years."

The section of the Act referred to is thus given:—

"Age of operator. No person shall operate or drive a motor-vehicle who is under eighteen years of age, unless such person is accompanied by a duly licensed chauffeur or the owner of the motor-vehicle being operated."

But the decision itself only dealt with estoppel, and held that the insurer was not estopped because of certain matters arising in the former trial not relevant to this case.

The result of the considerations which I have endeavoured to point out is that, subject to an objection still to be dealt with, the 16-year old driver of the motor-car was under the age-limit of 18 years "fixed by law" and that in the absence of proof that he was driving with the knowledge, consent or connivance of his mother, the defendants must be held liable.

The further objection to which I have referred is that sec. 85 of R.S.O. 1927, ch. 222 (in force since 1924), under which this action was brought, is *ultra vires* of the Provincial Legislature. On this we heard Mr. Bayly, K.C., representing the Attorney-General, as well as counsel for the plaintiff and defendants. The argument for the defendants on that point may be summed up in this way: That the defendants, being a company incorporated and licensed by the Dominion of Canada, had the right to make proper provision for the safety and security of their business, and for the making of proper returns, and that this section increased their liabilities and therefore rendered it impossible to make proper returns, which would have to include such contingent liabilities as this section was assumed to create. It was also contended that this was a new right of action, and not subrogation, and could not be imposed upon a company incorporated as a Dominion company. I do not think the defendants have made out these propositions. Assuming all that they have argued, it appears to me that the pith and substance of the section in question is the vesting of a right of action in an execution creditor of an insured person to recover in Court the amount for which the insurer, under its contract, was responsible, subject always, as I read the section, to all defences which would have been open to the insurer had the insured herself sued.

It must be borne in mind that the insurers are not parties to the original action and appear to defend themselves for the first time when sued by the execution creditor. The section itself says that the right of the execution creditor is to bring an action against the insurer "*to recover an amount not exceeding the face amount of the policy* or the amount of the execution *in the same manner* and subject to the same equities as the insured would have if the said judgment had been satisfied." While the term "equities" may not be an apt one to indicate the legal right of the insurer to defend himself by reason of the terms of the policy or by the provisions of any law or statute of which he may have the benefit, the execution creditor's right to recover against the insurer cannot be more extensive than that which the insured herself had, and must be limited by the scope and extent of that right. I think the vesting of such a right of action as I have indicated is a civil right, and that the Provincial Legislature could enact that moneys payable under a contract of insurance made in this Province might be recovered by force of an execution, just as they could validly enact that an execution creditor could garnish the amount due to the plaintiff or that the plain-

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tiff might have relief by way of equitable execution of the judgment against the defendants. As the insured herself could assign or transfer the insurance policy and the moneys thereby secured, I can see nothing exceeding the limits of the jurisdiction of the Provincial Legislature in the statutory right vested in the execution creditor, provided always that it is subject to the contract rights secured to the insurer by the terms of the contract or by any Provincial law or statute. It does not increase the insurer's liability, but it enables another person to recover upon and subject to the terms of the insurance contract, and so renders it prudent for insurers to see that any release or settlement with the insured, pending an action which may bring the section into play, has regard to the rights thereby given.

As to the amount of the judgment to be recovered against the defendants under the statute, it was argued that the costs of the appeal by Elizabeth Schwartz against the judgment at the original trial were not properly recoverable thereunder.

It is not suggested or argued that the appeal was in itself frivolous or unreasonable.

By the policy the insurer agrees and undertakes:—

“(e) To defend in the name and on behalf of the insured any civil actions which may at any time be brought against the insured on account of such damage or destruction, including actions alleging such damage or destruction and demanding damages therefor, although such actions are wholly groundless, false or fraudulent, unless the insurer shall elect to settle such actions.”

The insurer failed to carry out this agreement, and the damages for the breach may well include the costs of the appeal in question.

In the result the judgment of the learned trial Judge should be affirmed, for the reasons I have given, with costs of appeal and action.

MAGEE, J.A., agreed with HODGINS, J.A.

MIDDLETON, J.A.:—This is a purely statutory action brought by virtue of the provision of the Insurance Act, R.S.O. 1927, ch. 222, sec. 85, which enables a person who has recovered a judgment for injury or damage to his person or property, upon which judgment an execution has been returned unsatisfied, to sue the company which has insured the judgment debtor against liability for such injury or damage, and to recover an amount not exceeding the face amount of the policy or the amount of the judgment in

the same manner and subject to the same equities as the insured would have if the judgment had been satisfied.

In such an action the plaintiff must establish that he has a judgment for injury or damage to a person or property within the meaning of the policy upon which he sues, and that upon such judgment an execution against the insured has been returned unsatisfied. It is not necessary for the plaintiff to prove his original cause of action against the insured, because the statute renders this unnecessary, but the judgment is in no way evidence against the insured as to the matters in question in the original action, save as the statute has in effect varied the common law rule: *Zimmerman v. Kemp* (1899), 30 O.R. 465. The statutory action is in effect a mode of equitable execution based upon the original judgment.

At the hearing the defendant company contended that there could be no recovery upon the policy by reason of the breach of statutory condition No. 5, which provides that the insurer shall not be liable while the automobile, with the knowledge or consent of the insured, "is being driven by a person under the age-limit fixed by law." The car was being driven by the defendant's son. This young man was over the age of 16 but under the age of 18, and had no licence. The question to be determined is, therefore, whether he was "a person under the age-limit fixed by law," i.e., the law regulating the operation of motor-vehicles.

That it was unlawful for this young man to operate the car is plain, but this is not by reason of his age, but by reason of his failure to have a licence. It is true that the licence required in the case of a person over 16 and under 18 is a different licence, granted only after a more rigorous examination than that required in the case of a person over 18, but 18 cannot be said to be a limit prescribed by law for the operation of a motor-vehicle, while 16 is clearly such a limit.

The judgment rightly included all costs awarded in the original action. They are an incident and accretion of the demand: *Agius v. Great Western Colliery Co.*, [1899] 1 Q.B. 413.

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Appeal dismissed with costs.

[APPELLATE DIVISION.]

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April 23.

Negligence—Invitation by Owner of Land to Come upon it—Infant Invitee Straying from Place of Safety to Danger upon Adjacent Premises—Death of Child—Action by Parents against Invitor—Extent of Invitation—Duty Owed by Invitor.

The defendant S. owned a strip of land fronting upon a lake; his title was to the water's edge. Immediately adjacent was a sandy beach. S.'s land was advertised by him as "picnic grounds." The plaintiffs, man and wife, with their 7-year-old son, came upon the strip and picnicked there. The child went in wading in the shallow water near the shore, with other children. When the children were summoned to go home, this boy was missing; two days later his body was found in a channel or trench, not in front of S.'s property, but in front of the street immediately adjacent to it. The trench had been made by the municipal authorities as part of the means of procuring a supply of water:—

Held, that the fact that the body was found in the trench was not sufficient evidence to shew that the boy met his death by reason of playing in it; and upon that ground alone the action against S. should be dismissed.

But, assuming that the boy came to his death by drowning in the trench, it could not be said that he was there by the invitation of S.

One who invites another to use the property of a third person or of a public body impliedly warrants that the place to be used is safe for the purposes indicated, and the invitation imposes a duty upon the invitor to make sure that it is fit for the purpose suggested; but this does not make the invitor liable as an insurer of safety. The true measure of liability is indicated by the scope and nature of the invitation. And the duty is limited to those places (including the property of third persons) to which the invitee might reasonably be expected to go in the belief, reasonably entertained, that he is entitled or invited to do so.

It would be imposing too great a liability upon a landowner who permits his premises to be used as a picnic ground, in the hope of profit, to hold him liable for a disaster to a child whose parents permit him, not merely to bathe upon the safe beach in front of the picnic grounds, but to stray away to a danger in front of adjacent premises where he could not be supposed to be invited to disport himself.

Great Lakes Steamship Co. v. Maple Leaf Milling Co. (1924), 41 Times L.R. 21, and *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253, followed.

AN appeal by the defendant Stover from the judgment of the County Court of the County of Essex in favour of the plaintiffs (husband and wife) for the recovery of \$400 and costs against the appellant, in an action brought under the Fatal Accidents Act for damages for the death by drowning of the plaintiffs' young child, who, as alleged, went upon the premises of the appellant by invitation and strayed therefrom to a place of danger, where he was drowned.

March 28. The appeal was heard by MULOCK, C.J.O., MAGEE and MIDDLETON, JJ.A., and ROSE, J.

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Douglas Ellis, for the appellant. The learned trial Judge erred in finding that the deceased was an invitee of the appellant. The evidence disclosed that the deceased was in fact a trespasser in that part of the grove owned by the appellant, which was reserved for and rented to campers only. The evidence also shewed that the defendant owned the land only to the water's edge. The land under the water belonged to the Crown, and over it the appellant had no control. The trial Judge also erred in finding that the defendant Taylor had not exceeded his authority in advertising the grove as a bathing beach, and that he was the occupier of the bathing beach. The evidence further disclosed that the danger found to exist had been created by the Corporation of the Village of Belle River on Crown lands in respect of which the corporation had obtained a licence and exercised full control and management, knowing that the adjoining lands were used by bathers in great numbers. The utmost duty of the appellant was to warn the deceased of a danger if he knew it existed. He did not in fact know of this danger and was not negligent in not so knowing, being entitled to assume that the work done by the Government on its own lands and by its own engineers was done properly. In any event the appellant is entitled to relief over against the village corporation. The evidence does not shew that the deceased came to his death as a result of the danger found to exist. The danger was apparent, and the death was due to the deceased or his parents not taking due care. Reference to *Soulsby v. City of Toronto* (1907), 15 O.L.R. 13, and to *Esten v. Rosen* (1928), 63 O.L.R. 210, distinguishing the latter.

M. Stewart, for the plaintiffs, respondents. They paid a fee for entrance to the grounds and were entitled to assume that it was legal to be there. They were, on the evidence, clearly invitees and not mere licensees or trespassers. The danger was in the nature of a trap and was not apparent: *Mitchell v. Johnstone Walker Ltd.* (1919), 47 D.L.R. 293; *Findlay on Liability of Property Owners and Occupiers for Accidents* (1928), p. 240. There was a duty on the appellant to warn invitees of a danger which was so adjacent to his lands.

E. C. Awrey, for the Corporation of the Village of Belle River, defendant and third party, respondent. There was no invitation by the village. There is no common law right to bathe in the sea. Therefore there was no duty owed: *Halsbury's Laws of England*, vol. 28, p. 375, para. 697; *Moore v. City of*

App. Div. *Toronto* (1893), 26 O.R. 59, note; *Waite v. North Eastern Railway Co.* (1858), E.B. & E. 719.

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MORAND. *Ellis*, in reply, as to who are invitees, referred to the following additional authorities: *Connor v. Cornell* (1925), 57 O.L.R. 35; *Walker v. Midland Railway Co.* (1886), 2 Times L.R. 450; *Pedlar v. Toronto Power Co.* (1913-14), 29 O.L.R. 527, 30 O.L.R. 581, 15 D.L.R. 684, and annotation at p. 689.

April 23. MIDDLETON, J.A.:—An appeal by the defendant Stover from the judgment of his Honour the late Judge Kerr, at the trial of an action in the County Court of the County of Essex, pronounced on the 25th day of January, 1929, by which the plaintiffs recovered against the defendant Stover \$400 damages for the death of their infant child, a lad in his eighth year at the time of his death.

The defendant also asks that, in the event of his failing upon his main appeal, he be awarded relief over against the defendant the Village of Belle River under the third party notice served upon that municipality.

Stover owns a strip of land fronting upon Lake St. Clair. His title is to the water's edge. Immediately adjacent to his land is a sandy beach extending some 2,000 feet into the lake before there is a depth of water of three feet. Conceiving the plan of using this strip of land, called "Stover's Grove," for picnicking purposes, Stover made arrangements with the defendant Taylor to look after cars that might be parked, and to supply refreshments to visitors upon the land, the resulting money being divided, the major portion going to Taylor, and Stover receiving a small amount for the use of his land. In pursuance of this plan, a notice was posted in the village of Belle River, at the post-office: "Bathing Beach, Camping Grounds for rent. Apply Postmaster;" and near the grounds there were signs on posts, "To the Camping Grounds," "To the Picnic Grounds," "Parking in here 25c. per car."

On the 5th September, 1927, the plaintiffs and their infant child resorted to Stover's property, parked their car, paid 25 cents, and proceeded to enjoy a picnic. The child went in wading in the shallow water near the shore, with other children. At 7 o'clock the children were summoned to go home, but this boy was missing. Search was made for him and he was not found. His body was, however, found in a channel to be mentioned, two days later.

Immediately adjacent to Stover's property there is a road-allowance running down to the shore of the lake. At the foot

ERRATUM.

In 64 O.L.R. p. 126, 9th line from the top, delete the words
“the late.”

of this street there has been constructed the municipal water-works. Pursuant to a licence issued by the Dominion Government, which claimed to own the entire land under or covered by the water of the lake, the municipality has laid a pipe from the station upon the shore, some 1,800 feet out into the lake, to secure a water supply for the village. This pipe is laid in a shallow trench, and the contractors had placed a certain amount of excavated earth on top of the pipe to hold it in position, but had not restored the bottom of the lake to its original condition. This pipe was not in front of Stover's property, but was in front of the street immediately adjacent to it. It was in this ditch that the boy's body was found, but this is not, to my mind, sufficient evidence that the boy met his death by reason of playing in the ditch, as the learned County Court Judge has found, nor do I think the fact that mud was found upon the boy's feet after his body had floated in the water for two days is sufficient to establish this as the place of his death.

This alone would be sufficient to dispose of the appeal, but I think the case merits further consideration upon the other branches of the argument presented to us.

The Judge appealed from has arrived at the conclusion that there was an invitation by Stover, to all who felt inclined to avail themselves of the privilege, to use not only the defendant's property for picnicking purposes, but also to use the adjacent beach for bathing purposes, and that there was a failure on the part of Stover to discharge a duty cast upon him to see that this bathing beach was safe for children. In his opinion it did not make any difference whether Stover knew of the danger or not, it was his duty to examine the premises and see that they were safe before inviting people there to bathe.

The main ground of appeal argued for Stover was that the liability alleged against him was that of the owner of the premises to which others were invited to resort, and that his liability ended with his ownership at the water-line of the lake, and that those who resorted to the bathing beach resorted to it at their own risk. It was said that no authority could be found shewing any liability such as that alleged, save with respect to the property actually owned and occupied. It is true, as it was said, that there are cases indicating a liability where the source of danger is upon adjacent land, but that these indicate that the danger must be to those occupying and using the land owned by the person against whom liability is alleged.

I think that this is altogether too narrow a view, and that by a series of cases the liability is placed upon a much higher

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ground. These I had occasion to collect in *Great Lakes Steamship Co. v. Maple Leaf Milling Co.* (1922), 52 O.L.R. 222. There liability was alleged against the owner of a mill who had invited a shipowner to use a slip in a public harbour adjacent to the mill. The ship using this slip was damaged by an obstruction upon the floor of the harbour, and I thought the defendants liable upon the principle of the decision in the much quoted case of *The Moorcock* (1889), 14 P.D. 64, and *The Bearn*, [1906] P. 48.

This decision was reversed by a Divisional Court of the Appellate Division (1923), 54 O.L.R. 174, but was restored in the Privy Council (1924), 41 Times L.R. 21. The principle thus established is that those who invite another to use the property of a third person or of a public body impliedly warrant that the place to be used is safe for the purposes indicated, and the invitation imposes a duty upon those who invite, to make sure that it is fit for the purposes suggested.

This, however, falls far short of making the invitor liable as an insurer of safety, the true measure of the liability being indicated by the scope and nature of the invitation.

I accept what was said by Lord Chancellor Cave in *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253, at p. 260, as indicating the limitation upon the extent of the duty undertaken:—

“It was not to give him absolute protection in whatever part of the appellants’ premises he might be found, but only to use reasonable care for his safety while he was upon their land and acting in compliance with their invitation; and this duty must be limited . . . to those places to which he might reasonably be expected to go in the belief, reasonably entertained, that he was entitled or invited to do so.”

These words are, in my view, as applicable to the property of third persons to the use of which an invitation has been extended.

Applying these words to this case, I think it is imposing altogether too great a liability upon the landowner who permits his premises to be used as a picnic ground, in the hope and expectation of some trivial indirect profit, to hold that he is liable for a disaster which may overcome a child whose parents permit him, not merely to bathe upon the perfectly safe beach in front of the picnic ground, but who permit him to stray away to a danger in front of adjacent premises where he could not, by any stretch of the imagination, be supposed to be invited to disport himself. Assuming that the boy came to his death at

the place and in the manner suggested, I cannot think that he was there by the invitation of the appellant. See also *Connor v. Cornell*, 57 O.L.R. 35, and *Azzole v. W. H. Yates Construction Co. Ltd.* (1927), 61 O.L.R. 416.

In saying this, I am by no means forgetting or ignoring what was said by the Court in *Latham v. R. Johnson & Nephew Ltd.*, [1913] 1 K.B. 398, concerning the conduct of children "acting in the wantonness of infancy."

For these additional reasons, I think the appeal should be allowed, and the action should be dismissed, with costs, if asked for. The learned Judge in the Court below gave no costs to the defendants who succeeded, and I hope that the appellant will not ask for costs.

The appeal, so far as the municipality is concerned, will be dismissed, for where there is no liability, there can be no right of indemnity. As to this I would also give no costs.

MULOCK, C.J.O., and MAGEE, J.A., agreed with MIDDLETON, J.A.

ROSE, J., agreed in the result.

Judgment as stated by Middleton, J.A.

[ROSE, J.]

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Constitutional Law—Fines—Criminal Code, sec. 1036, Proviso—Intra Vires of Dominion Parliament—British North America Act, sec. 91 (27).

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The proviso to sec. 1036 of the Criminal Code, enacting that the fines referred to therein shall be paid to the municipal authority, is within the powers of the Parliament of Canada: British North America Act, sec. 91 (27).

A PETITION of right presented by the Corporation of the City of Toronto.

The petition was tried before ROSE, J., at a Toronto non-jury sittings.

G. R. Geary, K.C., and J. Johnstone, for the supplicants.
Edward Bayly, K.C., for the respondent.

April 23. ROSE, J.:—This is a petition of right. There is only one question for determination, viz., whether it was within the power of Parliament by the proviso to sec. 1036 of the Criminal

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ROSE, J. Code to enact that the fines referred to in the proviso should be paid to the municipal authority. Notice that the constitutional validity of the proviso was brought in question was given to the Attorney-General for Canada, but he, reserving his right to appear later if the case should go to a higher court, declined to be represented by counsel at the trial.

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By sec. 444 of the Criminal Code, it is made an indictable offence, punishable by seven years' imprisonment, to conspire, by deceit or falsehood or other fraudulent means, to defraud the public or any person, ascertained or unascertained, whether or not the deceit or falsehood, or rather fraudulent means, amounts to a false pretence.

By sec. 1035 (2) it is enacted that any person convicted of an indictable offence punishable with imprisonment for more than five years may be fined, in addition to, but not in lieu of, any punishment otherwise ordered.

By sec. 1036 it is enacted that whenever no other provision is made by any law of Canada for the application of any fine, penalty, or forfeiture imposed for the violation of any law, the same (except in certain cases not here important) shall be paid over by the magistrate or officer receiving the same to the treasurer of the Province in which the same is imposed or recovered; "provided, however, that with respect to the Province of Ontario the fines, penalties and forfeitures . . . shall be paid over to the municipal or local authority where the municipal or local authority wholly or in part bears the expense of administering the law under which the same was imposed or recovered."

A conviction was had at the Toronto assizes for the offence described in sec. 444. A sentence of imprisonment was passed and in addition a fine was imposed under sec. 1035 (2). The fine was reduced by the Appellate Division. A cheque for the amount of the reduced fine was handed to the senior registrar of the Supreme Court of Ontario. The city corporation, by notice served upon the registrar, demanded payment of the money pursuant to the proviso of sec. 1036. The registrar delivered the cheque to the Attorney-General. Thereupon this petition of right was presented, and, a fiat having been granted and the requisite proceedings taken, the case came on for trial.

It is admitted that the City of Toronto wholly or in part bears the expense of administering the law under which the fine was imposed and recovered; and, as has been stated, the only question is whether it was within the power of Parliament to enact that the fine should be paid to the city.

The contention of the Attorney-General for Ontario is that

the fine is one of the "royalties belonging to" the Province of Canada at Confederation; that it belongs therefore to the Province of Ontario under sec. 109 of the British North America Act; and that the power by sec. 91 (27) conferred upon Parliament to legislate with respect to "The Criminal Law except the constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters," does not extend to enable Parliament to decree that the fine shall go to the municipality rather than to the Province.

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The profits arising from the King's ordinary courts of justice are treated in the books as a branch of the ordinary revenue of the Crown, and therefore as one of the *jura regalia*; see, for instance, Chitty's Prerogatives of the Crown, pp. 199, 236; and these profits consist not only in fines imposed upon offenders, but also in certain fees due to the Crown in a variety of legal matters. Therefore, if the fine that is in question here was such a fine as is dealt with in the books, it would seem that there was a prerogative right to collect and retain it; and if that prerogative right belonged at Confederation to the Crown in the right of the Province of Canada, it would seem that it belongs now to the Crown in the right of the Province of Ontario; for the enactment in sec. 109 that the royalties shall belong to the several Provinces amounts to a reservation of those royalties to the Legislatures of the Provinces, and to an exception of them from sec. 102, by which section all duties and revenues over which the respective Provincial Legislatures at the Union had power of appropriation (except, *inter alia*, such portions thereof as are by the Act reserved to the respective Legislatures of the Provinces) are appropriated for the public service of Canada. All this follows, I think, from the judgment of the Judicial Committee of the Privy Council in *Rex v. Attorney-General of British Columbia*, [1924] A.C. 213. In that case it is decided that the word "royalties" as used in sec. 109 is used as the equivalent of *jura regalia*, and that its meaning is not limited by its association with the words "lands, mines, minerals."

But the prerogative right to fines did not extend to enable the Crown to claim all fines. Thus in Comyns's Digest, "Prerogative," it is said (D. 54. a.): "A fine may be imposed, where a man is indicted and convicted for any trespass or misdemeanour . . . ;" and (D. 55): "The King, by his prerogative, shall have all fines paid for writs, or imposed for crimes. And therefore, if upon a conviction for extortion, a man be fined to pay so much to the party grieved, (unless where by Act of Parliament it is directed,) it is error. R. 11 Car. I, 1 Rol. 220. I. 10." (In Rolle's note of the case cited, *Brunsdens* case, no reference is

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made to the prerogative. The fine, however, had been to pay treble damages to the party grieved; and the judgment was reversed because it was not warranted by any statute). And in Upper Canada at Confederation the statute law was that in cases not otherwise provided for in which by the criminal law of England in force in Upper Canada the whole or any part of a fine or penalty imposed for the punishment of any offence was in any manner appropriated to a purpose inapplicable to the existing state of Upper Canada, such fine or penalty, or the part thereof so appropriated, should when received be paid to the proper officer of the county or city in which the conviction had taken place; whereas every fine and penalty imposed for the punishment of an offence prohibited by a statute having force of law in Upper Canada only, and for the appropriation of which fine or penalty no other provision was made, should be paid into the hands of the Receiver-General, and should form part of the consolidated revenue fund of the Province; and that certain other fines and penalties should be paid to the county treasurers for a use specified: C.S.U.C. 1859, ch. 118. I think, therefore, that much of what was said in the House of Lords in *Bradlaugh v. Clarke* (1883), 8 App. Cas. 354, concerning penalties, could accurately have been said in Upper Canada concerning fines. At p. 358 the Earl of Selborne, L.C., said:—

"It was acknowledged, as an incontestable proposition of law, that 'where a penalty is created by statute, and nothing is said as to who may recover it, and it is not created for the benefit of a party grieved, and the offence is not against an individual, it belongs to the Crown, and the Crown alone can maintain a suit for it.'"

And Lord Watson said (p. 378) :—

"In the case of statutory penalties, enacted solely for the purpose of enforcing or protecting the interests of the public, the Crown alone has, by virtue of its prerogative, a title to sue and recover, unless the Legislature shall otherwise direct."

And Lord FitzGerald said (p. 383) that the authorities and precedents supported the position taken by the defendant in that case, viz. (p. 382) :—

"That where a statute imposes a penalty as a punishment for an offence, that penalty when incurred, belongs to the Crown, unless the statute provides otherwise, either expressly or by distinct or particular terms, or unless from the language of the statute and its subject-matter, and the machinery provided for enforcing the penalty, it can fairly and reasonably be inferred that the Legislature intended to give it to the informer;"

And he quoted from Bacon's Abridgment the following statement:—

"Also where a statute giveth a forfeiture either for nonfeasance or misfeasance, the King shall have it, unless it be otherwise particularly directed by the statute."

It seems to me, therefore, that it cannot be said that at Confederation the Crown in the right of the Province of Canada, had a prerogative right to all fines imposed and levied in the Province; the right in respect of such fines as in Upper Canada were imposed and levied under a statute arose, I think, only in case no other disposition of the fines had been made by the statute.

The fines created by sec. 1035 (2) of the Criminal Code are—or rather the fine authorised to be imposed in this particular case is—punitive rather than compensatory, and it is difficult to see how the punitive force of a fine can be affected by an enactment concerning the disposition to be made of the money levied. And since, in the absence of any such enactment, there would always be a hand to receive the money, and the title to the money when received would be in the Crown in the right of the Province, it can scarcely be said that the power to enact that the money when paid shall belong to some one other than the Crown is a necessary incident of the power to create the fine; but I do not think that it follows that the contention put forward on behalf of the Province in this case is entitled to prevail. There can be no doubt that the power of Parliament to legislate concerning the criminal law includes the power to create a fine as a punishment; and I think that, were it not for the suggestion that fines, when imposed, are by the British North America Act given to the Provinces in which they are collected, there could be no doubt that Parliament, in exercise of the power conferred by sec. 91 (27) of the Act, would have the right to say what disposition should be made of the money collected. For "the reservation of the criminal law for the Dominion of Canada is given in clear and intelligible words which must be construed according to their natural and ordinary signification.

. . . It is, therefore, the criminal law in its widest sense that is reserved. . . . The fact that from the criminal law generally there is one exception, namely, 'the constitution of Courts of criminal jurisdiction,' renders it more clear, if anything were necessary to render it more clear, that with that exception . . . the criminal law, in its widest sense, is reserved for the exclusive authority of the Dominion Parliament;" *Attorney-General for Ontario v. Hamilton Street Railway Co.*, [1903] A.C. 524.

In order to reach the conclusion that the proviso to sec. 1036 of the Criminal Code is invalid, it is necessary, as it seems to me,

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to proceed somewhat as follows: First you must treat the legislative authority in respect of fines as divisible into parts, one part being the power to create the fine and another part being the power to say what shall be done with any money collected; then you must treat the latter power, not as one expressly conferred, but as one conferred only inferentially, as incidental to the former, and as exercisable only when its exercise is essential to the effective exercise of the power to create the fine; and finally, having so split up the legislative authority, you must proceed to split up the legislation itself, and you must uphold the creation of the fine as coming within the power of Parliament, while you declare against the validity of the proviso on the ground that no necessity for passing the proviso has been shewn to have existed. But so to proceed would be, as I think, to treat the question in too narrow a manner and to go against the established canons of construction of the British North America Act. A much broader treatment seems to be indicated by the judgments of the Judicial Committee, for instance, *Attorney-General for Ontario v. Reciprocal Insurers*, [1924] A.C. 328, and the case referred to already, *Attorney-General for Ontario v. Hamilton Street Railway Co.*, [1903] A.C. 524.

The correct procedure seems to me, in the case in hand, to be this: You start with the fact that the criminal law "in its widest sense" is reserved for the exclusive authority of Parliament. Then you consider as a whole the legislation contained in sec. 1035 (2) and sec. 1036 (including the proviso). So considered, the legislation is seen to be "in pith and substance" legislation in relation to the subject assigned to Parliament by sec. 91 (27) of the British North America Act. You know, therefore, that the legislation is to be upheld as a whole unless there is a compelling reason for saying that it was beyond the power of Parliament to pass the part attacked—the proviso. But Parliament in the exercise of the power conferred by sec. 91 (27) of the British North America Act can prescribe punishments, and in prescribing punishments has an unfettered choice. The punishment may be imprisonment, whipping, forfeiture, fine, or anything else that to Parliament seems proper; and if the punishment selected is a fine the choice of the kind of fine would seem to be equally unfettered. So that if there are fines the nature of which is such that money due in respect of them may be collected and retained by the Crown in the exercise of the royal prerogative, and if there are other fines the nature of which is such that the royal prerogative will not reach the money due in respect of them, it is open to Parliament in its discretion to prescribe a fine of the one class or of the other. Therefore, if it seems that the legislation as a whole can reasonably be treated as legislation by which Parliament has created a

punitive fine of the class that (the money being payable to a municipality) is not reached by the royal prerogative, and no necessity is discovered for treating it as legislation by which Parliament has created a fine of the class that is reached by the prerogative, and has attempted, in defiance of sec. 109 of the British North America Act, to deprive the Province of the "royalty" so created, you find that no royalty came into existence, and that sec. 109 has no application, and, the creation of a fine of the particular class coming within one of the classes of subjects enumerated in sec. 91, you are not concerned with an inquiry as to whether, if Parliament were simply to create a fine of the class that is reached by the prerogative, later provincial legislation as to the disposition of any moneys received in respect of that fine could be upheld as coming within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by the Act assigned exclusively to the Legislatures of the Provinces.

My opinion is that there is less of the artificial involved in treating the legislation as resulting in the creation of a fine of the class that is not reached by the prerogative than there is in treating it as resulting in the creation of a "royalty" to which sec. 109 of the British North America Act applies. The circumstance that sec. 1056 of the Criminal Code as originally enacted did not contain the proviso, which was inserted by sec. 8 of the amending Act of 1922 (12 & 13 Geo. V. ch. 16), is of no importance. What is in question here is the right to the money paid in respect of a fine recently imposed; and in Ontario since 1922 no court sitting in such a municipality as is mentioned in the proviso has had authority under sec. 1035 (2) to impose, for an infraction of sec. 444, a fine to which the prerogative right can attach.

For these reasons, the judgment will be that the supplicants are entitled to the relief sought by their petition, viz., payment of the fine with interest thereon from the day when the money came to the hands of the Treasurer of the Province of Ontario, and the costs of the petition.

[IN CHAMBERS.]

CRAVEN v. LALONDE.

1929.

Attachment of Debts—Money Due by Company to Manager—Share of Profits—Contract of Hiring—"Wages"—Wages Act, R.S.O. 1927, ch. 176, secs. 1, 7.

April 25.

The plaintiffs, having an unsatisfied judgment against the defendant, attached a sum of money said to be due to him, in the hands of the W. company, which paid it into court. The defendant was in the employment of the company; he was obliged by his contract with

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it to give his whole time and attention to its service; the sum attached was remuneration for the services which he rendered to the company as its manager, being a share of the profits agreed to be paid in addition to salary; in his employment he agreed to act under the policies prescribed by the directors of the company; and the sum attached was not payable to him in any capacity other than that of an employee of the company:—

Held, that the sum attached was "wages" within the definition in sec. 1 of the Wages Act, and should be dealt with in accordance with the provisions of sec. 7.

AN appeal by the defendant, a judgment debtor, from an order of one of the Assistant Masters directing payment to the plaintiffs, judgment creditors, of a sum of money attached by the plaintiffs in the hands of the Watkins Rebabbiting Toronto Ltd., garnishees, and paid into court by the latter.

April 23. The appeal was heard by MASTEN, J.A., in Chambers.

H. F. Parkinson, K.C., for the judgment debtor.

James P. Manley, for the judgment creditors.

No one appeared for the garnishees.

April 25. MASTEN, J.A.:—The appeal is on the ground that the money paid into court by the garnishees is wages, within the meaning of the Wages Act, R.S.O. 1927, ch. 176. The facts are not in dispute and may be shortly stated as follows:—

The judgment debtor is indebted to the judgment creditors in the sum of \$9,384.60 and certain interest, and the judgment creditors claim to attach the sum of \$1,900 which has been paid into court by the garnishees. The point in issue is, whether this sum is wages within the meaning of the Wages Act. The fund in question became payable by the garnishees to the judgment debtor under a certain agreement, the relevant provisions of which are as follows:—

"This contract, made and entered into this 11th day of September, 1926, by and between the Watkins Manufacturing Company of Canada Ltd., party of the first part, and E. C. Lalonde, of Toronto, Canada, party of the second part, witnesseth:—

"Whereas party of the second part has made application for and desires to become manager for the party of the first part,—

"Therefore, for and in consideration of the mutual covenants and agreements hereinafter set out, party of the first part agrees to employ the second party as its manager, and party of the second part accepts such position on a salary and share of the net profits as hereinafter set out.

"1st. Party of the second part shall receive a salary of \$50 per week, payable weekly in advance, and to be allowed travelling expenses only when in the territory, and then only actual travelling expense, which is to be evidenced by itemised statements on the books.

"2nd. Second party is to participate on a 50-50 basis in the balance of any profits from the business after the following deductions have been made:

"3rd. Party of the second part agrees that he will carry on the management of the Watkins Manufacturing Company of Canada Ltd. to the best of his ability and under the policies prescribed by its board of directors, and that he will provide a good and sufficient surety bond in the sum of \$5,000, the premium on said bond to be paid by the first party.

"5th. That he, second party, will devote his entire time and attention to the business and have no other connections, and commissions, if any are received by him, will be turned to the company"

The salary of \$50 per week has been paid, and there is admittedly due to the judgment debtor his share of the net profits for the year 1928.

The question turns on the construction to be placed on the term "wages" as defined in sec. 1 of the Wages Act. The section reads as follows:—

"'Wages' shall mean and include wages and salary whether the employment in respect of which the same is payable is by time or by the job or piece or otherwise."

The first question is whether the judgment debtor was in the employment of the garnishees.

On this question the terms of the agreement as quoted above appear decisive. He is "employed" as manager and is to "carry on the management under the policies prescribed by its board of directors." Thus, the terms of the agreement distinguish this case from *Re Specialty Bags Co.* (1923), 53 O.L.R. 355, where the relative positions were those of buyer and seller rather than of any other character. *Re Hercules Rubber Co. Ltd.* (1922), 22 O.W.N. 610, was decided under sec. 51 (3), now 121 (3), of the Bankruptcy Act, where the words are:—

"All wages, salaries, commissions or compensation of any clerk, servant, travelling salesman, labourer or workman in respect of services rendered to the bankrupt or assignor during three

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months before the date of the receiving order or assignment" are entitled to a preference.

These words are so different from the words used in the Wages Act that the judgment cannot afford any assistance, though its result is to hold that the claimant was in the employ of the bankrupt and entitled to a preference for the commission earned by him.

In *Fayne v. Langley* (1899), 31 O.R. 254, a question arose as to whether the president and vice-president were entitled to a preference for arrears of salary due them by the company, and it was held that the sum claimed was due them not *quâ* president and vice-president, but for services rendered under an agreement of employment.

The cases referred to by Meredith, C.J.C.P., in *Re Parkin Elevator Co. Ltd.* (1916), 37 O.L.R. 277, at p. 283, indicate that any remuneration for service is in the nature of wages or salary, provided (as I point out at pp. 286-7) it is a contract for service as distinguished from a contract for services.

I have also considered the case of *Re Dominion Shipbuilding and Repair Co. Ltd.* (1921), 51 O.L.R. 144, but it does not appear to afford any assistance.

All these cases were decided on statutory enactments which differ widely from sec. 1 of the Wages Act, and except indirectly they do not afford assistance.

It is clear that the judgment debtor was in the employment of the garnishees; that he was obligated to give his whole time and attention to that service; that the sum in question is remuneration for the services which he rendered to the company as its manager during 1928; that in his employment he was to act under the policies prescribed by the board of directors of the company; and that the fund in question did not become payable to him in any other capacity than as an employee of the company.

Having regard to these considerations, I think that the sum in question is wages as defined in sec. 1 of the Wages Act. The order of the learned Assistant Master should be vacated and the sum now in court should be dealt with in accordance with the provisions of sec. 7 of the Wages Act. If any question or difference arises regarding the settlement of the order I may be spoken to.

Costs of this appeal will be paid by the judgment creditors to the judgment debtor.

[APPELLATE DIVISION.]

RE MAYO AND CITY OF TORONTO.

1929.

Municipal Corporations—Expropriation of Easement—Award of Compensation—Enforcement—Demand by Corporation for Conveyance—Refusal of Claimant to Execute—Automatic Vesting of Easement in Corporation—Municipal Act, sec. 337 et seq.

April 26.
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Where an easement was expropriated by a municipal corporation under the powers given by sec. 338 of the Municipal Act, R.S.O. 1927, ch. 233, it was held, upon a motion by the claimant under sec. 13 of the Arbitration Act, R.S.O. 1927, ch. 97, for an order to enforce the award of compensation made in his favour, that the municipal corporation was not entitled to withhold payment of the compensation-money until the claimant had executed a conveyance of the easement; for the easement had automatically vested in the corporation.

Sections 337, 338, 342, 343(5), 346, and 348 of the Municipal Act, considered.

The procedure under the English Land Clauses Consolidation Act, 1845, 8 & 9 Vict. ch. 18, is not applicable to expropriation under the Ontario Act.

MOTION by the claimant for an order permitting her to enforce in the same manner as a judgment an award of compensation for the expropriation by the Corporation of the City of Toronto of an easement.

The motion was heard by KELLY, J., in the Weekly Court, Toronto.

H. F. Parkinson, K.C., for the claimant.

F. A. A. Campbell, for the corporation, contestant.

April 26. KELLY, J.:—The Corporation of the City of Toronto, for the purpose of constructing a sewerage system, passed a by-law for the expropriation of certain easements, including an easement to pass underneath the claimant's house and premises; and in pursuance thereof proceedings were taken to determine what compensation should be paid to her by reason of such expropriation. In the proceedings an award was made fixing her compensation at \$800, and awarding her her costs of the arbitration, which have since been taxed. The corporation has been ready and willing to pay these sums, and submitted for execution by her a form of grant of the easement. She has refused, however, to sign it or to give any conveyance or assurance; and she has now applied for an order giving her leave to enforce the award in the same manner as a judgment of this Court.

She is labouring under a misapprehension in assuming that the expropriation by-law operated to vest the easement in the corpora-

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tion. In *Grimshaw v. City of Toronto* (1913), 28 O.L.R. 512, at p. 517, it is said that the right conferred by the statute (referring to the statute dealing with expropriation proceedings) is an option to take at a price to be determined by arbitration. That judgment is opposed to the contention that upon the passing of the by-law the property became vested in the municipality, "because," as stated on pp. 516 and 517, "the true nature of the by-law, as indicated by the decision in *In re McColl and City of Toronto* (1894), 21 A.R. 256, "is altogether repugnant to this idea."

The principle which applies is stated in *In re Cary-Elwes' Contract*, [1906] 2 Ch. 143, at pp. 148 and 149, that "in cases of compulsory purchase, after notice to treat and ascertainment of the price, a contract is established, enforceable in a Court of Equity, and with regard to which both vendor and purchaser can enforce specific performance . . . After notice given and the price fixed, the relation of the parties as vendor and purchaser was as fully constituted as in the case of a formal and regular agreement . . .

The principle is fully established that when land is purchased compulsorily, after the price has been ascertained, the purchaser is in the same position with regard to the landowner as an ordinary purchaser, and will be compelled by a Court of Equity to complete the purchase. It is an implied term of every contract for the sale of real property, if not expressed, that the contract shall be followed by a deed of conveyance conveying the property to a purchaser, and this may be enforced by a suit for specific performance . . . The intention of the parties in an ordinary contract for the sale and purchase of real property is that the purchaser shall pay the purchase-money and that the property shall be conveyed by a duly executed deed to the purchaser." See also *Regent's Canal Co. v. Ware* (1857), 23 Beav. 575; *Guardians of the East London Union v. Metropolitan Railway Co.* (1869), L.R. 4 Ex. 309; and *In re Pigott and Great Western Railway Co.* (1881), 18 Ch. D. 146.

The contestant having acquired the easement and the lands being now subject to it, the importance of putting it on record by registration and thus giving notice of it should not be overlooked.

The contention advanced by the claimant's counsel in the argument, that "her title may be further impaired or clouded by the granting of a deed which might extend or alter that which the city has taken, and might affect her right to some further compensation which might possibly arise in the future or in some other way," is not an answer to the corporation's demand. The form of the grant or assurance of what was intended to be expro-

priated is a matter of conveyancing. There should be no difficulty in settling upon such a form as will confine it to that which the city is obtaining, and in respect of which the award has been made.

I have not considered—I have not been asked to consider—the form of grant submitted for the claimant's signature. Her present objection is not to the form but to the making of any grant or executing any document whatever. It is unfortunate that the parties have been unable to agree upon the method of completing the transaction; as a matter of conveyancing that does not, in my opinion, present any difficulty. The claimant has been inconsistent in maintaining her position; and her counsel, on the argument, repudiated the suggestion of a vesting order. Her application, in the form and limited as she has made it, must be refused with costs.

The claimant appealed from the decision and order of KELLY, J.

June 12. The appeal was heard by LATCHFORD, C.J., MASTEN, ORDE, and FISHER, J.J.A.

Parkinson, K.C., for the appellant, argued that the contestant, having passed the by-law expropriating the sewer easement on the 31st May, 1926, and having registered the by-law on the 10th June, 1926, and having entered upon the land and having completely constructed the sewer prior to the notice of arbitration, cannot be heard to say that the easement, whatever it may be, has not vested. "Expropriation" is defined in the Municipal Act, R.S.O. 1927, ch. 233, sec. 337 (a), as taking without the consent of the owner. Section 338(1) gives the contestant the power to expropriate land, and "land" by sec. 337 (b), includes an easement. The contestant, having entered, cannot take advantage of the desistment clause, sec. 351. Reference to *In re Prittie and Toronto* (1892), 19 A.R. 503, 522; *Re MacPherson and City of Toronto* (1895), 26 O.R. 558; *Grimshaw v. City of Toronto*, 28 O.L.R. 512, 517; and *Re Dixon and City of Toronto* (1924), 56 O.L.R. 167, 172. By analogy, the easement expropriated must have vested, the right of desistment having been waived by virtue of entry and construction. The English cases do not apply because they are based upon the English Lands Clauses Consolidation Act, 8 & 9 Vict. ch. 18. The English statute is based upon the theory that the expropriating authority must investigate the title and serve notice to treat upon all parties interested as vendors, and that after settlement of the compensation (purchase-price) the relationship of vendor and purchaser exists (reference to secs. 18, 30-44, and 75-77, of the English Act).

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The word "expropriation" does not appear in the English statute or in any of the English cases or authorities.

Campbell, for the respondent, argued that the cases referred to by the Judge upon the original hearing applied, and that the principle of the English statute applies to the Ontario legislation. The Municipal Act does not operate to vest the title in land or easements, even though the municipality may have entered and destroyed its right of desistment: *Hanna v. City of Victoria* (1916), 27 D.L.R. 213.

June 26. MASTEN, J.A.:—This is an appeal from the order pronounced by Kelly, J., on the 26th day of April, 1929, whereby he refused the application of the claimant for an order to enforce the award of the Official Arbitrator herein dated the 25th day of October, 1928, in the same manner as a judgment.

The facts out of which the question now in appeal arises are stated by Kelly, J., in the judgment appealed from *supra*.

I have read and considered all the cases cited to us by counsel, and many other cases which were referred to in these various decisions, and the whole question appears to me to turn upon whether the provisions of our Municipal Act are *in pari materia* with the provisions of the English Land Clauses Act under which the English authorities have arisen.

Certain points are obviously clear: First, under the provisions of our Municipal Act, the municipal corporation has the right to rescind an expropriation by-law and resile from the proposed expropriation at any time until possession has been taken or the award has otherwise been adopted, but a careful perusal of all the cases dealing with this phase of the matter makes it plain that, after taking possession or otherwise adopting the award, the city corporation has no such right.

In the present case possession has been taken and the sewer in question has been constructed through and under the claimant's premises.

In the next place, it is clear and well-established law that under the English Land Clauses Act the notice to treat and the subsequent fixing of the compensation do not operate in any way as a conveyance of the lands, but that is laid down in Cripps on Compensation, 6th ed., p. 228, as follows:—

"When the value of lands has been fixed by an assessing tribunal in conformity with all the requirements of the Land Clauses Act, 1845, or has been agreed, there is a final and complete contract, and either party can bring an action for specific performance."

But in such an action the claimant, if seeking to enforce payment of the amount of the award, must plead and prove tender of a conveyance, and not only so but the expropriating body, whether a railway or the municipal body, is bound to accept a conveyance at its own expense.

Our Act, R.S.O. 1927, ch. 233, appears to me to be based on an entirely different principle. By sec. 338, the council of every corporation can pass by-laws "for acquiring or expropriating any land required for the purposes of the corporation, and for erecting buildings thereon, and may sell or otherwise dispose of the same when no longer required."

Section 337 defines "expropriation" as follows:—

"'Expropriation' shall mean taking without the consent of the owner, and 'Expropriate' and 'Expropriating' shall have a corresponding meaning."

The result, in my opinion, of these words is that as soon as the right of the municipal corporation to withdraw and resile from the expropriation is ended, either by taking possession or by any other unequivocal adoption of the award, then, without more, the municipal corporation has taken, without the consent of the owner, the lands expropriated—in this case the by-law itself suffices under the statute to vest the title to the easement in the municipal corporation, so that that body may protect its rights by a registration of the by-law without any conveyance from the owner.

I have, as above noted, read all the cases cited to me, and have looked carefully for any further judicial indication of opinion on the point now presented. The only authority which at all throws light on the point is the view expressed by Cameron, J.A., in the Manitoba Court of Appeal in the case of *Haney v. Canadian Northern Railway Co.* (1918), 42 D.L.R. 41, at p. 50. The expropriation in that case was by a railway company and not by a municipal corporation, and, referring to the statutes bearing upon the question, he says:—

"As I read the above sections together it follows that upon payment or tender to the owner or upon payment into court of the amount of the compensation awarded, the title to the property becomes absolutely vested in the railway company, and there is no necessity for a conveyance by the owner or by the promoter to give the company title. Such a case is not precisely that of vendor and purchaser though the relations of the parties are in some respects analogous thereto."

And he considers that the English cases cited are of doubtful application.

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On these grounds I would, with the greatest respect for the opinion of my brother Kelly, allow the appeal with costs.

FISHER, J.A., agreed with MASTEN, J.A.

ORDE, J.A.:—This is an appeal from the judgment of Kelly, J., upon a motion made by virtue of sec. 13 of the Arbitration Act, R.S.O. 1927, ch. 97, for an order to enforce an award.

The award is that of the Official Arbitrator for the City of Toronto made in respect of the expropriation by the city of an easement in or over certain lands of the claimant.

By the award dated the 25th October, 1928, the claimant was awarded the sum of \$800 as compensation for the expropriated easement, and the costs of the arbitration, which were taxed at \$413.50. The city, however, refuses to pay the sum awarded and the taxed costs unless the claimant executes a conveyance to it of the easement so expropriated. This the claimant refuses, upon the ground that the easement has already vested in the municipal corporation by virtue of the statutory provisions empowering it to expropriate, and of the exercise of its powers thereunder, and that no conveyance is necessary.

The motion to enforce the award is the result, and that motion has been dismissed by the judgment now appealed from.

I find myself unable, with respect, to agree with that judgment. The expropriation here is made under the powers given to a municipal corporation by sec. 338 of the Municipal Act, R.S.O. 1927, ch. 233. That section authorises the council of every such corporation to pass by-laws "for acquiring or expropriating any land required for the purposes of the corporation." By para. (a) of sec. 337, "Expropriation" means "taking without the consent of the owner," and "Expropriate" has a corresponding meaning, and by para. (b) "land" includes "a right or interest in, and an easement over, land." And subsec. 3 of sec. 338 requires the by-law to contain a description of the land to be expropriated, and, if it is proposed to expropriate an easement, to state the nature and extent thereof. Section 342 provides for the payment to the owner of compensation for the land expropriated, which if not mutually agreed upon is to be determined by arbitration. By sec. 346, the compensation "shall stand in the place of the land" and "any claim to the land shall be converted into a claim upon the compensation."

The expropriation was begun by the passage of a by-law, No. 10868, on the 31st May, 1926, which declared that "for the purpose of constructing a five foot circular brick sewer through and

across the lands in this section hereinafter described the right to tunnel through and across the said lands and to construct and maintain and if necessary reconstruct the said sewer through and across said lands in such tunnel is hereby expropriated and taken," and the city engineer and all servants etc. of the corporation are empowered to construct the sewer with all necessary plant, etc. The lands are then described as being part of lot 684 on plan 1534, etc., consisting of a strip 20 feet wide, and lying 10 feet on each side of a certain line drawn from Rochester-avenue to Cheltenham-avenue. The lands so described were the property of the claimant. The claimant thereupon claimed compensation and asked that it be determined by arbitration.

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Though it is not so stated anywhere definitely in the material before us, it appears to be clear from the language of the award that the corporation had already entered upon the land and constructed the sewer before the award was made. At all events it was taken for granted upon the argument before us that the entry had long since been effected.

The argument of counsel for the city, which Kelly, J., has adopted, is that the effect of a municipal expropriation is to make the owner a compulsory vendor to the city, giving to the city the right of a purchaser under an agreement for sale to enforce specific performance, and so entitling the city as a purchaser to a conveyance of the land expropriated. There is nothing whatever in the Municipal Act to lend colour to this argument, and it is based solely upon the law and practice in England under the provisions of the Land Clauses Consolidation Act of 1845 (8 & 9 Vict. ch. 18). Now it is quite plain, when one examines that Act and the cases which have arisen under it, that an expropriation thereunder is deemed theoretically to be a compulsory purchase, that is, the owner of the land to be expropriated is compelled to "sell" it and becomes an involuntary or compulsory vendor thereof. And the Act expressly provides for the conveyance of the lands when the compensation is fixed, and, if a conveyance is refused, for the deposit of the compensation in the Bank of England and for the somewhat anomalous procedure of vesting the lands in the "promoters of the undertaking" (by which is meant the person or body entitled to exercise the expropriating power) by means of a deed poll executed by themselves. It is noteworthy that in the text-books, "expropriation," as we understand it, is discussed under the heading "Compulsory Purchase of Land." See, for example, Halsbury's Laws of England, vol. 6, pp. 1 *et seq.*

This procedure is quite foreign to our system, but is easily

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understood when it is remembered that there is no universal provision for the registration of deeds or of titles in England, so that the existence of some instrument in the form of a conveyance as an evidence of title is there of some importance. At any rate, whatever may be the reason for the procedure in England, there is no parallel between the provisions of the English Act and those of our Municipal Act in this respect. For that reason I cannot see how the English practice or the English authorities relied on by the city have any application to the interpretation of the expropriation provisions of our Municipal Act in this regard.

It is rather odd that in the group of sections in the Municipal Act dealing with expropriation there is no express declaration as to when in the course of the proceedings the owner's title shifts and becomes that of the corporation. But that at some stage of the proceedings the lands vest in the corporation automatically and without the necessity for any conveyance by the owner, is, I think, reasonably clear from the language and general tenor of the legislation. In the first place power is given to "expropriate," that is, to take without his consent, the property of the owner in the land to be taken. Whenever the expropriation is completed and so is in full operation, it seems to me to be plain that then the owner's title is at an end and the corporation's title is completely vested. Whether that title vests upon the passage of the by-law or upon the actual entry into the lands or upon the making of the award, or upon the payment of the compensation, is by no means clear to me, but I am satisfied that, entry having been made, the payment of the compensation will have the effect of completely vesting the land in the corporation without any conveyance from the previous owner. The exact nature and extent of its title will then depend upon the language of the expropriating by-law and the description of the land, whether it be a mere easement or otherwise, contained therein. That by-law may be registered, as it doubtless was, and I cannot see what more the city wants.

The city suggests that, the thing expropriated being an easement, it is entitled to some instrument defining it. This very suggestion affords an answer to the city's argument. When the whole title of the owner is taken by the city, it is a matter of no consequence to him how sweeping the conveyance of his interest may be. He is parting with every vestige of his interest in the land, and, so long as he is not required to enter into any onerous covenants, the exact language of the grant would be immaterial to him. But the definition of an easement is an entirely different matter, and the owner of a parcel of land may well baulk at the

suggestion that the city's title to an expropriated easement is afterwards to be governed by the language of a deed tendered to him for execution, rather than by the language of the proceedings for expropriation and the law applicable thereto.

The only provisions of the Act which directly refer to vesting mentioned on the argument or that I have been able to discover are subsec. 5 of sec. 343 and sec. 348. Section 343 deals with by-laws for deferred work in respect of highways and for postponing the date for entering upon the lands until a day to be fixed by the by-law, and for the registration of a draft plan in advance etc.; and by subsec. 5 it is provided that in such cases the land shall be deemed to vest at once in the corporation, subject to the right of the owner to remain in possession until entry by the corporation. Now, if this section serves to throw any light upon the question of vesting in ordinary cases, it indicates that vesting takes place when the city takes actual physical possession of the expropriated property. That seems to me to be the logical effect of expropriation under the statute. If the title does not vest upon the passage of the by-law or its registration, it seems to follow from the language of the Act that it vests when the city in fact "expropriates," that is, actually takes the property, and thereby ejects the owner from his possession of it. Then there is the provision in sec. 346 that the compensation shall stand in the place of the land, and that any claim to the land shall be converted into a claim upon the compensation. If the title to the land is thus "converted" into something else, the title to the land has gone and the only right then left to the owner is that of compensation. In saying this I am not holding that the city is in all cases empowered to enter before the compensation is fixed or paid.

Section 348, to which reference was also made, clearly refers to those cases mentioned in the preceding sections where payment of the compensation is required to be made into court, and to the making of a vesting order in such cases. It throws no light upon the question raised here. There is nothing in it from which one can infer that in other cases a conveyance is necessary.

I am, therefore, of the opinion that, without attempting to decide exactly when during the course of the expropriation proceedings the title to the easement became vested in the city, it would vest immediately upon payment of the compensation, if not sooner, and that the city is not entitled to any formal conveyance from the claimant whatever.

The appeal should be allowed and the Court should order that the award be enforced by directing the city corporation forthwith

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 RE MAYO and payable. The city should also pay to the claimant the costs
 AND CITY OF of the motion to enforce the award and of the appeal.
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LATCHFORD, C.J., agreed with ORDE, J.A.

Appeal allowed.

[APPELLATE DIVISION.]

1929. FORT FRANCES PULP AND PAPER CO. LTD. v. SPANISH RIVER PULP
May 3. AND PAPER MILLS LTD.

War Measures—Control of Supply of Newsprint—Plaintiffs Supplying more than Fair Share—Action against other Manufacturers for Indemnity and Adjustment—Contract—Statutory Authority—War Measures Act, 1914, 5 Geo. V. ch. 2, sec. 6—Paper Controller and Appellate Tribunal—Orders in Council—Jurisdiction of Supreme Court of Ontario.

The judgment of GRANT, J.A., 61 O.L.R. 512, was affirmed on appeal. Held, that neither by reason of a contract between the plaintiffs and the defendants, nor by reason of the effect of the War Measures Act, 1914, and the orders in council and the orders of the Paper Controller and of the Paper Control Tribunal passed or made thereunder, had the plaintiffs established a legal right to payment by the defendants of such amounts as would cover the loss suffered by the plaintiffs in supplying more than their proper share of newsprint to Canadian publishers during the period from the 1st January, 1918, to the 31st December, 1919.

Held, also, that the Supreme Court of Ontario, not being one of the "courts, officers and authorities" prescribed by the Governor in Council, as mentioned in sec. 6(2) of the War Measures Act, 1914, had no jurisdiction to enforce an order made under sec. 6.

AN appeal by the plaintiffs from the judgment of GRANT, J.A., 61 O.L.R. 512.

February 5 and 6. The appeal was heard by LATCHFORD, C.J., RIDDELL, ORDE, and FISHER, JJ.A.

W. N. Tilley, K.C., and A. J. Thomson, K.C., for the appellants, argued that the manufacturers of newsprint in Canada were under obligation to supply newsprint paper to Canadian publishers ratably, and had agreed amongst themselves to adjust by money payments any claims arising through some manufacturers supplying more and others less than their proportion. If the appellants

had no contractual rights, they had a statutory right to be paid. Effective orders directing adjustment of differentials were made by the Controller from time to time, and the basis of adjusting differentials by money payments was definitely settled by orders of the Controller, the Paper Control Tribunal, and the Governor in Council: *In re Price Bros. and Co. and Board of Commerce of Canada* (1920), 60 Can. S.C.R. 265; *Attorney-General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508. The Court had the power to make the adjustment which the Controller should have made. In so far as the machinery for adjusting the rights of the parties broke down, it was the Court's duty to supply the deficiency: *Cameron v. Cuddy*, [1914] A.C. 651.

Glyn Osler, K.C., and *G. R. Munnoch*, for the defendants other than the E. B. Eddy Company Ltd., the News Pulp and Paper Company Ltd., and the defendants represented by other counsel, respondents, submitted that there was no agreement between the appellants and the respondents as to differentials, and they had the finding of the learned trial Judge that there was none. Then, under the War Measures Act, there was no power to order payment: *Attorney-General v. Wilts United Dairies Ltd.* (1922), 38 Times L.R. 781. If there were such power, an order in council was not made to enforce it: *Wolverhampton New Waterworks Co. v. Hawkesford* (1859), 6 C.B.N.S. 336. Even if the Governor in Council had power to order payment, the Paper Controller could not so order, and, if he did, this Court had no power to grant the appellants relief: *Fort Frances Pulp and Power Co. Ltd. v. Manitoba Free Press Co. Ltd.*, [1923] A.C. 695.

G. F. Henderson, K.C., for the defendants the executors of John R. Booth, respondents.

J. G. Gibson, for the defendant the Spanish River Pulp and Paper Mills Ltd., respondent.

L. A. Landriau, for the defendants the Abitibi Power and Paper Company Ltd. and the St. Maurice Paper Company Ltd., respondents.

May 3. ORDE, J.A.:—Before proceeding to discuss the questions raised by this appeal, some explanation may be expedient, as a matter of record, of my sitting as a member of the Court. As appears from the evidence at the trial, I acted throughout the War as counsel for the E. B. Eddy Company Ltd. in the prolonged proceedings before the Paper Commissioner and Controller and before the Paper Control Tribunal, upon which proceedings the present action is based. I was appointed to the Bench shortly before those proceedings were concluded. The Eddy company was made a party defendant to this action, but not by reason of any

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claim made against it by the plaintiffs, and its counsel was permitted to withdraw at an early stage of the trial and it takes no part in this appeal.

Before the appeal came on, I intimated to my colleagues and to counsel that my connection with the paper control proceedings might render my sitting inadvisable, but counsel for all parties stated then and at the opening of the appeal that they were all desirous that I should sit and my colleagues also expressed their acquiescence.

The plaintiffs base their declaration that they are entitled to recover upon two grounds: first, that there was a contract among the manufacturers of newsprint paper by which (I quote from para. 5 of the statement of claim) "it was agreed by the plaintiffs and defendants that an adjustment would be made so that those manufacturers who supplied more than their proportion of the Canadian demands would be compensated for their extra loss by those who supplied less than their share;" and, second, that by virtue of the War Measures Act passed by the Dominion Parliament on the 22nd August, 1914, 5 Geo. V. ch. 2, and of the Act of the 7th July, 1919, 9 & 10 Geo. V. ch. 63, and of the orders in council and the orders of the Paper Controller and of the Paper Control Tribunal made thereunder, a statutory liability to make such compensation was imposed.

The question of contractual liability was disposed of in a few words by the learned trial Judge, who found that no such contract as alleged had been proved by the plaintiffs. Upon the appeal, while the contention was not expressly abandoned, no argument was made upon it by the plaintiffs' counsel, who confined their attack upon the judgment below to the second ground above mentioned.

The learned trial Judge has so fully recounted the sequence of events during the whole period of the Government's control over the disposal of newsprint paper that it is unnecessary to repeat the whole story. I shall refer only to such facts as serve to explain the conclusions at which I have arrived.

The plaintiffs' right to the compensation claimed in this action depends wholly upon the effect of the War Measures Act of 1914 and the later Act of 1919, and upon the sufficiency of the orders in council and the orders of the Paper Controller and of the Paper Control Tribunal passed or made thereunder as establishing a legal right to the compensation claimed which can be enforced by the Supreme Court of Ontario.

No question is raised by any of the defendants as to the power of Parliament to pass the War Measures Act, or to vest in the Governor in Council the powers which that Act purported to confer

upon the Executive Government of Canada. Any such defence would probably have been as hopeless in this case as it proved to be in *Fort Frances Pulp and Power Co. Ltd. v. Manitoba Free Press Co. Ltd.*, [1923] A.C. 695.

But those defendants who, if the plaintiffs' contention is established, will be liable to contribute towards the compensation claimed, set up certain defences or contentions which may be divided substantially into three, viz. :—

1. That, whatever the powers conferred upon the Governor in Council by the War Measures Act of 1914 may have been, no power was given by the Act or by order in council to any Minister or to the Paper Controller to make an order for the payment of money by one person to another which would create an enforceable legal liability.

2. That, if any such power was conferred, it was not, so far as it might have served as a foundation for the relief claimed in this action, ever exercised.

3. That, even had the power been exercised and an order been made by the Controller for the payment of money (whether ascertained as to amount or not) there is no jurisdiction in this Court to grant the plaintiffs any relief.

We are not called upon to deal with any question as to the extent of the power of the Parliament of Canada in time of war to pass such measures for the defence of Canada as may interfere with matters within the provincial legislative field, such as property and civil rights. That such power is very wide is established by the judgment of the Privy Council in the *Fort Frances* case, and it may be within the power of Parliament in such an emergency so to legislate as to create a civil liability to pay money by one person to another, enforceable by action in any provincial court. But the point made by the defendants is that the orders in council, under which first the Minister of Customs and afterwards the Paper Controller assumed the power to order those manufacturers who supplied less than their proportion of the Canadian demand for newsprint to pay what were termed "the differentials" by way of compensation to those who were supplying more than their proportion, did not either expressly or by implication confer any such power. The learned trial Judge has expressed some doubt upon this point. If the validity of any orders rested mainly upon the powers expressly conferred by the orders in council of the 16th April, 1917, and the 3rd November, 1917, I should be inclined to the view that no such power was given. But this argument is, in my opinion, very much weakened, so far as the orders made by Mr. Pringle as Paper Controller are

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concerned, by the fact that down to the time when the Paper Control Tribunal was appointed, each order made by him was expressly ratified by order in council. If it be assumed, for the purpose of argument, that the Government of Canada, that is the Governor in Council, had the power to order the payment of money by one manufacturer to another, it would be difficult to hold that the approval or ratification by order in council of such an order made by the Controller did not constitute an effective executive act on the part of the Government.

It may be observed in this connection that the Government clearly recognised the right of the Paper Controller to order one group of manufacturers to compensate the other group by its peremptory action when the Abitibi company refused to pay its proportion of the differentials in accordance with the Controller's order. That action took the form of a notice that the Abitibi company's licence to export paper would be suspended unless the money were paid within one week. Whether there was an enforceable civil liability or not, the Government possessed a very effective practical means, during wartime, of enforcing the orders of its officials.

The substantial obstacles in the plaintiffs' path are those set up by the two other grounds of defence above mentioned. They depend, not upon the validity or otherwise of the acts and things done by the Paper Controller and by the Governor in Council, but upon the question whether or not those acts and things really imposed upon the respondents any legal enforceable liability to compensate the plaintiffs as claimed. They may well be discussed together.

It is upon sec. 6 of the War Measures Act, 1914, 5 Geo. V. ch. 2, that the plaintiffs' claim is based. That section is as follows:—

“6. The Governor in Council shall have power to do and authorise such acts and things, and to make from time to time such orders and regulations, as he may by reason of the existence of real or apprehended war, invasion or insurrection deem necessary or advisable for the security, defence, peace, order and welfare of Canada; and for greater certainty, but not so as to restrict the generality of the foregoing terms, it is hereby declared that the powers of the Governor in Council shall extend to all matters coming within the classes of subjects hereinafter enumerated, that is to say:—

“(a) censorship and the control and suppression of publications, writing, maps, plans, photographs, communications and means of communication;

“(b) arrest, detention, exclusion and deportation;

“(c) control of the harbours, ports and territorial waters of Canada and the movements of vessels;

“(d) transportation by land, air, or water and the control of the transport of persons and things;

“(e) trading, exportation, importation, production and manufacture;

“(f) appropriation, control, forfeiture and disposition of property and of the use thereof.

“2. All orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe, and may be varied, extended or revoked by any subsequent order or regulation; but if any order or regulation is varied, extended or revoked, neither the previous operation thereof nor anything duly done thereunder, shall be affected thereby, nor shall any right, privilege, obligation or liability acquired, accrued, accruing or incurred thereunder be affected by such variation, extension or revocation.”

By sec. 7 it was provided that when compensation was to be made for any property appropriated by his Majesty under the provisions of the Act, or of any order in council, order or regulation made thereunder, the claim therefor was to be referred by the Minister of Justice to the Exchequer Court of Canada, or to any Superior or County Court of the Province within which the claim arose, or to a Judge of any such Court.

Section 8 provided for forfeiture of ships or vessels used or moved, or of goods dealt with, contrary to any order or regulation under the Act, by proceedings in the Exchequer Court or in any Superior Court.

Section 9 empowered the courts mentioned in secs. 7 and 8 to make rules governing the procedure upon any reference made to or proceedings taken before such courts under those two sections.

Section 10 empowered the Governor in Council to prescribe penalties by way of fine or imprisonment or both, enforceable upon summary conviction or upon indictment, for violations of orders and regulations made under the Act.

Section 3 provided that secs. 6, 10, 11, and 13 of the Act should only be in force during war, invasion or insurrection, real or apprehended.

The primary object of the Government when it commenced to exercise control over the distribution of newsprint paper was, in the words of the order in council of the 16th April, 1917, “to ensure to publishers of Canadian newspapers an adequate supply

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of newsprint paper at reasonable prices." The attempt to equalise prices as between those manufacturers who were supplying more than their proportionate share of the Canadian demand and those who were supplying less, by means of the differentials, was really incidental to that primary object, though none the less important if justice were to be done as between the two groups of manufacturers. One of the chief difficulties in the way of this method of equalisation was that the prices to be paid by the publishers to the manufacturers were fixed by the Controller from time to time for comparatively short periods, in most cases less than three months, and were then only tentative, being expressly subject to future revision. This revision might be upwards or downwards, and depended upon the statements prepared from time to time by the accountants whom the Controller employed to examine the manufacturers' books as to cost of production, etc., and upon the Controller's conclusions thereon. All of this took time, and there was the further delay in the final settlement of prices consequent upon the setting up of the Paper Control Tribunal, which was empowered to sit as an appellate tribunal and review all the orders of the Controller. All this uncertainty as to whether the prices so fixed from time to time would stand or whether the manufacturers would either receive something more or be obliged to make a refund to the publishers, for paper sold and delivered many months before, added to the difficulties in fixing the differentials as among the manufacturers themselves. They likewise were necessarily subject to future revision by the Controller and ultimately to review by the Control Tribunal.

In all his price-fixing orders down to and including that of the 30th August, 1918, there appeared a general provision as to the payment of differentials by one group of manufacturers to the other. In all his later orders this provision was omitted. Whether the establishment, a few days later, namely, on the 16th September, 1918, of the Paper Control Tribunal, had anything to do with this omission or was a mere coincidence, is not clear.

By his order of the 6th August, 1918, the Controller had fixed the amounts of the differentials respectively payable by the contributing manufacturers for a period of 10 months ending on the 31st December, 1917, amounting in all, with interest, to \$100,797.71. Upon appeal the Paper Control Tribunal on the 18th August, 1919 (more than a year later), disallowed the interest and reduced the amount fixed by the Controller's order to \$72,507.12. The Controller's price-fixing order of the 30th August, 1918, the last one containing the general provision for the payment of differentials, fixed the prices payable by the publishers down to the 1st October, 1918.

Beyond those two orders, there was never any effective judicial act either by the Paper Controller or by the Paper Control Tribunal which dealt with differentials or in any way fixed or determined the amount thereof, either tentatively or finally.

For some reason, not quite clear, there was appended as a foot-note to the Controller's order of the 17th December, 1919, a memorandum that nothing in the order should prejudice the rights of the interested parties in the matter of differentials, and a similar provision was embodied in his order of the 24th December, 1919. Just what purpose this mention of differentials was to serve is not explained. It was perhaps intended either as a warning to those who would be called upon to contribute, that the matter of differentials for the period subsequent to the 31st December, 1917, was still an open and unsettled one, or as a salve to those who would be entitled to receive compensation, or both.

So that we have the amount of the differentials payable by the contributing manufacturers definitely and finally fixed by the Control Tribunal down to the 31st December, 1917, and a general direction by the Controller in his orders covering the period down to the 1st October, 1918, that in requiring the manufacturers to accept from the publishers the prices thereby fixed, there should, in certain events, be an adjustment among themselves by means of the payment of differentials. But no order fixing the amount of the differentials in accordance with this direction was ever issued by the Controller.

There are, however, in connection with the claim put forward by the plaintiffs, two matters of a somewhat extraordinary nature which call for comment. There was produced at the trial a document dated the 17th July, 1919 (exhibit 4a), purporting to be an order signed by the Paper Controller fixing certain amounts to be paid by the contributing manufacturers to the plaintiffs as differentials for the period from the 1st January, 1918, to the 1st July, 1918. This document was apparently found among the papers of the Paper Controller in the possession of the Board of Commerce of Canada, which had been appointed by order in council of the 29th January, 1920, as Commissioner and Controller of paper, shortly after the resignations of Mr. Pringle and of Mr. Breadner. Not only is there no evidence that this document was ever issued or delivered as an order to any of the parties interested, but there is the positive statement by Mr. Pringle himself, as recorded in the minutes of the proceedings before him on the 17th September, 1919 (exhibit 31), that he had made an order, which he did not issue, directing payment of further differentials, followed by his reasons for not issuing it. This statement is

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strengthened by the recital in the document signed and issued by Mr. Pringle on the 23rd January, 1920, seven days after he had tendered what the Government regarded as his resignation as Paper Controller, and one day after such resignation had been formally accepted and his successor had been formally appointed by order in council.

In that document it is recited that no orders had been put into effect in regard to differentials since the order of the 6th August, 1918. There is also the statement in Mr. Pringle's letter to Mr. Tilley of the 9th November, 1921, that no further order (referring to that of the 6th August, 1918), had ever been issued by him. In view of the fact that the document of the 23rd January, 1920, purported to deal expressly with the matter of differentials, it is impossible to believe that it would not have recited this document of the 17th July, 1919, if Mr. Pringle had really issued it as an order. Had Mr. Pringle been alive, his evidence at the trial of this action would doubtless have amplified the statement made by him at the hearing of the 17th September, 1919; but, even without any further explanation as to the existence of the document, it is, I think, clearly established beyond question that, as found by the learned trial Judge, the document of the 17th July, 1919, was never in fact an effective or valid order. In my opinion it constitutes, so far as it affects the matter in issue here, just so much waste-paper.

The other extraordinary matter is the document of the 23rd January, 1920, just mentioned. In discussing this, some reference to the Act passed on the 7th July, 1919, 9 & 10 Geo. V. ch. 63, is necessary. The preamble of that Act recited the orders in council for the appointment of a Commissioner and Controller of Paper and for the creation of a Paper Control Tribunal and that there were certain investigations and work begun by the Commissioner and Controller which were not completed and certain matters still pending and undetermined by the Control Tribunal. This was followed by provisions confirming and extending the powers, jurisdiction, and authority of the Commissioner and Controller to such extent as might be necessary to enable such Commissioner and Controller fully to complete all work and investigations begun by him under the two orders in council of the 16th April, 1917, and those of the 21st April, 1917, and the 3rd November, 1917, prior to the declaration of peace, and to determine all questions and to make all necessary orders with respect to matters begun by or coming before him prior to the publication in the Canada Gazette of a proclamation by the Governor in Council declaring that the war which commenced on the 4th August,

1914, no longer existed. There was also a corresponding provision as to the powers of the Paper Control Tribunal.

When he made the so-called order of the 23rd January, 1920, Mr. Pringle may have considered that some powers had been reserved to him to make such an order by the provision of the Act of 1919 just mentioned. And it is to be noted that his letter of the 16th January, 1920, to Sir Henry Drayton, the then Minister of Finance, is not in terms a resignation of his office. He asks to be relieved from the distribution of newsprint, but at the same time points out that he had certain duties to discharge under the Act of 1919. Just what he expected the Government to do in consequence of this letter is not clear. It might perhaps have been possible under the Act to relieve Mr. Pringle of some part of the duties remaining to be performed, and at the same time to allow him to wind up other matters. The Government, however, did not so interpret his letter, but treated it as a resignation of his office "as Controller of newsprint and other paper" and as such formally accepted it by order in council on the 22nd January, 1920 (P.C. No. 145), and by another order in council of the same date (P.C. No. 154), appointed Mr. Breadner in his place. It may be that when he made the order he did not know that the Government had yet acted upon his letter or if acted upon that it failed to provide for some continuance of his powers as Paper Controller in accordance with the suggestion in his letter. Or it may be that he thought the Act of 1919 had in some way vested certain continuing powers in him as *persona designata*.

Whatever may be the explanation of the making of the order of the 23rd January, 1920, there can be no doubt, in my opinion, that on the preceding day Mr. Pringle's powers and authority as Paper Controller, as well under the War Measures Act of 1914 and the orders in council passed thereunder as under the Act of 1919, had completely ceased, and that any powers and duties remaining to be exercised and performed by the Paper Controller were then wholly vested in Mr. Breadner. The Act of 1919 vested the continuing powers in the Commissioner and Controller of Paper by virtue of that office, and it is not possible to construe the Act as giving power to the then occupant of the office as *persona designata*. Mr. Pringle himself evidently later came to the conclusion that the so-called order of the 23rd January, 1920, was ineffective, for he so states in his letter to Mr. Tilley of the 9th November, 1921, already mentioned. The learned trial Judge was right in holding that this document never became an effective order of the Paper Controller.

The plaintiffs' claim is for "a declaration that such of the defendants as supplied less than their proper share of newsprint

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to Canadian publishers during the period from the 1st January, 1918, to the 31st December, 1919, are liable to pay to the plaintiffs the loss suffered by the plaintiffs in supplying more than their proper share of newsprint to Canadian publishers during the said period," also for "an accounting between the parties for the said period," and for "payment of the amounts found owing to the plaintiffs upon such accounting."

Now, as already pointed out, there was never any effective order of the Paper Controller entitling the plaintiffs to payment of any definite amounts by way of compensation by any of the defendants in respect of the period of two years in question, nor was there any general direction, as a term or provision of the orders fixing prices for the same period, that there should be compensation by means of the payment of differentials, except for the first nine months thereof, that is down to the 1st October, 1918, the end of the period for which prices were fixed by the Controller's order of the 30th August, 1918, which, as already stated, was the last order which embodied the general direction for the payment of differentials.

This general direction as to the earlier period of nine months does not, in my opinion, really affect the principles upon which the plaintiffs' claims for relief are to be determined, but the fact that the Paper Controller, in the exercise of the powers which he believed were conferred upon him, formally imposed in general terms a liability in certain events upon some of the manufacturers to pay compensation to the others, and that all the Controller's orders fixing prices for those nine months were each expressly approved by order in council, places the plaintiffs' claim for relief as to that period on somewhat higher ground than the claim as to the remaining 15 months. The claim as to these 9 months, if not barred by other considerations, would perhaps have not only strong equitable grounds for its support, but even some legal grounds based upon the statutory effect of the War Measures Act, 1914, and the orders in council passed thereunder, including those which approved the Controller's orders. When I speak of equitable grounds, I mean such equitable grounds as might be deduced from the mere inclusion of the differential provision in the orders. The learned trial Judge came to the conclusion that the action must be dismissed, with reluctance, because he thought that the plaintiffs had not been fairly treated. Though I speak of equitable grounds, I desire to make it clear that I am not referring to any question of fairness or otherwise in the result so far as the plaintiffs' claim is concerned. There were so many factors, such as cost of production, freight rates, domestic and export prices, etc., for consideration during the period of paper control that it would

be impossible, in my opinion, to predicate what the ultimate conclusion upon the question of differentials for the years 1918 and 1919 would have been. The determination of that question rested in the first instance with the Paper Controller and in the final resort with the Paper Control Tribunal, and, except by inference from the fact that differentials were ordered to be paid and the amounts so to be paid were ultimately fixed for the period up to the 31st December, 1917, there is no justification that I can see for the view, as if it were a foregone conclusion, that the Controller or the Control Tribunal would have ultimately fixed any amount whatever as owing by one group of manufacturers to the other. The system of paper control set up by the Government was a war measure designed to assist and protect the nation in the prosecution of the war. The powers vested in the Paper Controller were subject to approval or disapproval for a time by the Governor in Council and later to review by the Paper Control Tribunal. The equalisation of profits by means of the differentials was not in any sense a necessary incident of control. The learned trial Judge has held that it was beyond the powers of the Controller. Whether it was beyond the powers of the Governor in Council is a question which, as I have already pointed out, is not raised before us. But, whether it was within the power of the Controller or the Government or not, it was by no means incumbent upon either to exercise the power; and if no attempt at equalisation had been made by the Controller or the Control Tribunal or the Government, throughout the whole period of paper control, however unfair the omission to do so might have been, I find it difficult to see upon what ground, either legal or equitable (I use the term "equitable" in its technical, and not in any popular, sense), those manufacturers who had failed to reap as large a profit from the production and sale of newsprint as others could have compelled the others, by means of an action in the Courts, to hand over some of their greater profits to those who had not been so fortunate. It seems to me that to state the proposition in this simple form is to answer it.

Does the plaintiffs' claim for relief really present itself in any other form than the proposition I have just stated? I cannot see how it does. Omitting for the moment the possible effect of the general direction as to differentials in the Controller's orders covering the months between the 1st January and the 1st October, 1918, as a foundation of liability in respect of those nine months, upon what theory can the plaintiffs base any claim for compensation from the defendants or any of them, in the absence of some order of the Paper Controller or of the Paper Control Tribunal? What is its cause of action? You cannot, by merely establishing

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that the Government, in the exercise of some compulsory power given it by Parliament, has forced you to do something in such a way as to cause you some loss greater than that which has been sustained by others in a similar position, have a cause of action for compensation against those others. In saying this I am perhaps in effect repeating what I have already said. But this simple principle meets the plaintiffs at the very threshold of their case.

I cannot help thinking that the discussion of the question involved here has been greatly confused and obscured both by the fact that compensation was definitely ordered and the amount fixed for a period prior to 1918, and by the ineffective (again I am for the moment omitting the possible effect of the order of the 30th August, 1918) references to differentials by the Controller and others during the later proceedings before the Controller; and also by the undoubted fact that the Controller apparently considered not only that the question of differentials subsequent to the 31st December, 1917, was still open, but that some compensation ought to be made by some of the manufacturers to the others. But the definite fixing of the amount of compensation for the period prior to the 1st January, 1918, cannot, upon any principle that I know of, be relied upon as establishing a basis of liability for any subsequent period. Remove the impression created by the effective disposition of the question of differentials for that earlier period from one's mind and consider the question of liability raised in this action as if there had been no question of differentials prior to 1918, and it seems to me that the foundation for the plaintiffs' claim for compensation in this action completely disappears. How can the fact, assuming it to be the fact, that the Paper Controller thought that compensation ought to be made, or that he intended to order it, constitute any basis for an action if he failed to give concrete expression to that thought or intention by some effective order or decision which would have been subject to review by the Paper Control Tribunal or to approval by the Governor in Council?

It is quite clear to me that, quite apart from any difficulty confronting the plaintiffs as to the jurisdiction of this Court to entertain the action, the plaintiffs' claim for compensation, so far as it covers the period of 15 months between the 1st October, 1918, and the 31st December, 1919, has no foundation whatever, statutory or otherwise. There is in fact no cause of action as to that period entitling the plaintiffs to any relief whatever, even if this Court had complete jurisdiction to grant relief of the nature claimed.

As to the earlier period of nine months, that is from the 1st January, 1918, to the 1st October, 1918, the general direction

to make compensation, while indicating an intention on the part of the Controller to implement it by some more specific order when complete information would be available and the prices to be charged the publishers finally fixed, cannot, in my judgment, form the basis of any enforceable legal right or give rise to any cause of action. It was merely one movement in the machinery created by the Government to assist in the prosecution of the war. It was impossible to forecast what the next movement might be. Many things might have happened. The manufacturers affected might have discontinued manufacture or refused to sell at the prices dictated by the Controller, at the probable risk of having their factories taken over by the Government. The exigencies of the situation as it developed might have rendered it inexpedient to make any further order or to attempt otherwise to enforce the general direction to make compensation. That is in effect what happened; nothing more was done and the intention to enforce compensation was never carried out.

The plaintiffs rely upon *Cameron v. Cuddy*, [1914] A.C. 651, in support of their contention that when there is an obligation to pay and the proceedings designed to ascertain the amount due prove abortive, it is the duty of the Court to supply the defect by itself ascertaining the amount. In that case there was a contract to pay which of itself created a liability and gave rise to a cause of action. The proceeding by way of arbitration designed by the contract fell through and it became impossible to ascertain the sum due by that method. I see no parallel between that case and the present one. There was there a fundamental liability created by contract which provided that the amount due should be determined by arbitration. The contract was not of such a character as to make the award a condition precedent of liability. Here there is not, in my judgment, any liability to pay, statutory or otherwise, upon which a Court, following the principle applied in *Cameron v. Cuddy*, could proceed to ascertain the amount due. The general direction to make compensation did not create any actionable liability whatever.

I have dealt at length with the merits of the plaintiffs' claim rather than dispose of it upon the mere question of the jurisdiction of this Court to entertain the action. And when I use the term "merits" I am not referring to any principles of natural justice, which no Court is ever called upon to administer, but to the existence of any statutory right to assert the claim as a legal cause of action given to the plaintiffs by virtue of the War Measures Act, 1914. Whether it would have been legally possible for the Governor in Council, under any authority conferred by the Act, to have created an actionable liability as between subject and

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subject, is, in my opinion, extremely doubtful, however extensive the powers of the Government might be by means of its war machinery, including the creation of special courts for the purpose, to enforce any order it might make. But what was done here fell far short of anything which ever purported to impose any definite liability upon any of the defendants so far as the years 1918 and 1919 were concerned.

Coming now to the question of jurisdiction, I can see no answer to this objection. The learned trial Judge has rightly held that this case falls within the third class mentioned by Wills, J., in *Wolverhampton New Waterworks Co. v. Hawkesford*, 6 C.B.N.S. 336, at p. 356, namely, "Where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it." There were many ways by which the Government with the extraordinary powers given by the War Measures Act might have enforced its orders, such as the imposition of penalties, or forcible seizure or confiscation. But the feature of the Act which, in my judgment, establishes beyond question that relief for things suffered in consequence of the exercise of the powers thereby given to the Governor in Council must be such as are given by the Act itself, is the positive provision embodied in subsec. 2 of sec. 6, quoted above, that "all orders and regulations made under this section shall have the force of law, and shall be enforced in such manner and by such courts, officers and authorities as the Governor in Council may prescribe." The only courts or officers ever prescribed under this provision were the Paper Controller and the Paper Control Tribunal. The Government might have set up other courts for the purpose or have declared that the Controller's orders might be enforced in the ordinary courts of law. But it did not do so. The word "shall" is clearly imperative and there is nothing in the context to justify any other interpretation.

The War Measures Act was designed to vest in the Government of Canada full control of all such measures as it might deem necessary in the prosecution of the war with full power to enforce them by such means as it saw fit. The provision that its orders were to have the force of law and were to be enforced in such manner and by such courts, officers and authorities, as the Government itself might prescribe, was clearly intended to give the Government absolute and unfettered control over the means it chose to adopt—within the range of the powers conferred upon it by the Act, of course—for the defence of the nation. It might enforce such orders by the summary exercise of its military or police power, or through the medium of the courts, but the choice of the means for such enforcement rested solely with the Government.

The enactment that the orders made under it should have the force of law was in aid of the Government and was not intended to confer rights upon the subject. The provision for compensation in cases of expropriation of property was an indication of some protection against a possible arbitrary exercise of power, though the wording of sec. 7 lends colour to the argument that whether or not compensation would be made depended upon the will of the Government, and the principle of *Attorney-General v. De Keyser's Royal Hotel Ltd.*, [1920] A.C. 508, might not be applicable.

The jurisdiction of the courts to determine the scope of the powers conferred by the War Measures Act and the validity of any order in council passed thereunder was not taken away. The *habeas corpus* proceedings in the Supreme Court of Canada to test the validity of the order in council enforcing conscription, in the case of *Re Gray* (1918), 57 Can. S.C.R. 150, established that. But there is a vast difference between a question as to the validity of an order made under the Act, and the means for enforcing an order on the assumption that it is valid. The very assumption of its validity removes it from the jurisdiction of the ordinary courts unless such jurisdiction was expressly conferred by the Government.

There is nothing in this view to conflict with the *Fort Frances and Manitoba Free Press* case, already mentioned. That action was brought not to enforce an order of the Paper Controller but for repayment of moneys which in the result were in excess of those which ought to have been paid. It was in substance an ordinary common law action for money had and received: see [1923] A.C. 695, at p. 703.

In the reasons of the learned trial Judge is a passage indicating that the Paper Control Tribunal may still dispose of certain appeals as to prices. Whether the Tribunal still exists or has any further power may be seriously doubted. It is quite clear from the order in council establishing it that the Tribunal could only exercise an appellate jurisdiction over orders made by the Controller. It had no original jurisdiction whatever, and if still in existence would have no power to make any order for the payment of differentials.

The appeal should be dismissed.

LATCHFORD, C.J. and FISHER, J.A., agreed with ORDE, J.A.

RIDDELL, J.A.:—This is an appeal from the judgment of Mr. Justice Grant at the trial of an action arising, like so many others, from the disorganisation, by the Great War, of the world of business in Canada.

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The exigencies of war required the enactment of the statute (1914) 5 Geo. V. ch. 2, under sec. 6 of which the acts were done upon which this proceeding is founded, the plaintiffs claiming that, by reason of what was done under this section, the defendants are liable to them for, at least, some money.

The facts are stated accurately and with sufficient fullness by my learned brother Grant in his luminous reasons for judgment; and I do not repeat them. Without finally so deciding, I, as at present advised, agree in the conclusions at which he has arrived, and would, in that view alone, dismiss the appeal.

But there is another ground of which little was said in the argument upon which I think the appeal fails.

No doubt, recognising the very complicated and difficult situations which might arise in the course of a novel and unprecedented experiment, Parliament decided that, while "all orders made under this section" should "have the force of law," the enforcement of them should not be left to the ordinary courts, but they should be "enforced in such manner and by such courts, officers and authorities, as the Governor in Council might prescribe:" (1914) 5 Geo. V. ch. 2, sec. 6 (2).

This Court is not one of "such courts;" we have no direction from the Governor in Council, and I think that we have no jurisdiction in the matter.

It is not such a case as *Cameron v. Cuddy*, [1914] A.C. 651, in which a liability to pay something existed in fact, but the method agreed upon to determine the amount became impossible. There the Judicial Committee, following the previous case of *Hamlyn & Co. v. Talisker Distillery*, [1894] A.C. 202, held that the Court would enforce the liability.

The case of *Fort Frances Pulp and Power Co. v. Manitoba Free Press Co. Ltd.*, [1923] A.C. 695, an appeal from the judgment in *Manitoba Free Press Co. Ltd. v. Fort Frances Pulp and Paper Co. Ltd.* (1922), 52 O.L.R. 118, might be appealed to as shewing jurisdiction in this Court. The point was not raised in that case, and the provisions of sec. 6 (2) were never considered, all parties taking it for granted, apparently, that the Court had jurisdiction. The only matter decided by me in the trial Court was "whether the Paper Control Tribunal and the Paper Controller had been validly vested with power to make the orders in controversy:" [1923] A.C. at p. 699; and that was the only matter decided by the Judicial Committee (except the rejection of the reasons for judgment of the Appellate Division). That was an action to recover from the defendants sums of money paid to them in excess of the proper amount; and the Judicial Committee considered "that the effect of these orders . . . was to render

the" defendants "liable to account for the balance . . . on the footing of being money had and received to the use of" the plaintiffs (p. 703). Such an amount would be recoverable in a simple Common Law action.

In the present case, however, the amount to be paid, if any, had not been determined by the proper tribunal; and, indeed, it may be said that the liability to pay anything had not been finally determined—the Controller might still have said that there was nothing payable; his discretion was broad and might be exercised in any way, subject, of course, to appeal; any discretion he might exercise was subject to the supervision and control of the Tribunal; in a word, there was no final adjudication, but the matter was still discretionary; and that discretion was not entrusted to this Court.

I am unable to find any sound basis upon which to found jurisdiction in this Court and wou'd dismiss the appeal with costs.

Appeal dismissed.

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Vendor and Purchaser—Execution by Vendor (Defendant) of Transfer of Land to Purchaser—Transfer by Purchaser to Plaintiff—Failure to Register Transfers—Execution by Vendor of Transfer to another Purchaser in Good Faith for Value and without Notice—Right of Plaintiff to Recover Damages from Defendant—Breach of Implied Obligation to Give Quiet Enjoyment—Damages for Tort—Land Titles Act, R.S.O. 1927, ch. 158, secs. 37, 68—Unregistered Estate—Breach of Trust.

The defendant, being registered under the Land Titles Act as owner in fee of a parcel of land, sold and conveyed it to B., who, with the defendant's knowledge, sold and conveyed it to the plaintiff. The two conveyances were not registered; and the defendant, knowing that he had no longer any interest in the land and that the plaintiff was the true owner, executed a conveyance or transfer to R., and thereby (R. having registered his transfer) wrongfully deprived the plaintiff of his title:—

Held, assuming that R. purchased for value, in good faith and without notice, so that the plaintiff could not recover the land, that the plaintiff was entitled to recover damages from the defendant.

Per CURIAM:—The defendant, by giving his signature, in however good faith and innocence, to the document under which alone R. was enabled to oust the plaintiff, broke the obligation for quiet enjoyment implied in the agreement for sale, and the plaintiff was entitled to damages for the breach of that obligation.

Per LATCHFORD, C.J., and ORDE, J.A.:—An action on the case for damages lies against one who by his power of disposition over land has wrongfully deprived the true owner of his title; and here the defendant was guilty of a tort when he executed the transfer.

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McLennan v. McDonald (1871), 18 Gr. 502, applied.

Again, the vendor, the defendant, was in equity a trustee for the plaintiff, the purchaser; and, having regard to the provisions of secs. 37 and 68 of the Land Titles Act, the execution and delivery of the transfer to the plaintiff created in him an unregistered estate —recognised by the Act—and when the defendant transferred the legal estate or ownership to R. he was guilty of a breach of trust for which he must answer.

AN appeal by the defendant from a judgment of the District Court of the District of Cochrane.

The following statement is taken from the judgment of RIDDELL, J.A.:—

The defendant, the owner of certain land which had been brought under the Land Titles Act, transferred it to one Botley, he to one Bourcier, and Bourcier to the plaintiff. After the death of Bourcier, his wife, after a dispute over the payment by the plaintiff, transferred it to one Rheault. He found that the previous transfers had not been entered; and, as the title was still apparently in the name of the defendant, Rheault required his signature. Mrs. Bourcier called on the defendant for such a signature and obtained that of the defendant and that of his wife. Thereupon Rheault had his title entered, thus cutting out the plaintiff, by reason of the provisions of the Land Titles Act. The plaintiff brought this action in the District Court for damages for the loss of the land for which he had paid, and recovered judgment for \$600. The defendant's appeal was from that judgment.

February 7. The appeal was heard by LATCHFORD, C.J., RIDDELL, ORDE, and FISHER, J.J.A.

G. W. Mason, K.C., for the appellant, argued that there was no legal ground for awarding damages against him. He had involuntarily and innocently signed the transfer to Rheault, believing it to be a transfer in form, but a quit-claim deed or release in substance, and had not been guilty of any fraud or deceit.

B. A. Ramsay, for the plaintiff, respondent, contended that the intention of the appellant did not matter. He had infringed a legal right of the respondent in signing the transfer to Rheault: Pollock's Law of Torts, 11th ed., p. 282; *Forsyth v. Johnson* (1868), 14 Gr. 639; *Stephens v. Bannan and Gray* (1913), 14 D.L.R. 333. In the circumstances, the appellant was a trustee for the respondent. He was also guilty of a breach of the covenant for quiet enjoyment: Heap's Canadian Decisions as to Sales of Land, p. 17.

May 3. RIDDELL, J.A. (after setting out the facts as above):—In this appeal a singular complication is made to appear, the law

as to which does not seem to have been considered by any Court; and the case must be decided on principle.

There is little or no dispute as to the facts.

It is said that the defendant acted in good faith; but it is plain that, as he was, if not the owner in fee, at least the *dominus terræ*, and that, so far as the ownership of the land was concerned, as the purchaser could not have his title filed and so become in law and in fact effective owner of the land, Rheault, for all purposes of law and fact, claimed by, through, and under the defendant.

It becomes necessary to consider the state of the matter at the Common Law, and how far the defendant has rendered himself liable to an action for damages by his conduct—which I am assuming to have been honest and in good faith.

For more than a century, it has been clear law that an agreement to sell in fee simple carries with it the right of the purchaser to proper covenants: Halsbury's Laws of England, vol. 25, p. 462, note (t), citing *Church v. Brown* (1808), 15 Ves. 258, 263—the Lord Chancellor, indeed, in that case speaks of a "covenant" to sell, but the same principle applies to an agreement not under seal, and, *à fortiori*, to an actual sale, as in this case. If the purchaser omits to take a formal covenant, he may find himself in trouble — see note (b) on the same page; but, when the land is under the Land Titles Act, the practice is not to take a formal conveyance; and I think that the transferee under this Act must be considered to be in at least as high a position, *quoad* his transferor, as if he were the holder of a contract of sale and entitled to the usual covenants.

One of these "usual covenants" is a covenant for quiet enjoyment—Halsbury, *loc. cit.*, pp. 462, 463, para. 838. The form of such a covenant appears from the works on conveyancing, e.g., Key & Elphinstone's Precedents in Conveyancing, 11th ed., pp. 536, 537; it includes the undertaking "that the said . . . premises . . . shall remain and be to the said purchaser, his executors, administrators, and assigns, . . . and that all the said . . . premises shall be quietly . . . held and enjoyed . . . without any interruption or disturbance by the said vendor, his heirs, executors, or administrators, or any person claiming or to claim under . . . him." To much the same effect is our own Short Forms of Conveyances Act, now R.S.O. 1927, ch. 143, which in schedule B., clause 3, gives the undertaking of the vendor who conveys by the short form mentioned that the purchaser shall hold "without any let . . . interruption, claim or demand . . . by him . . . or any person claiming

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As a necessary consequence, I think that the defendant, by giving his signature, in however good faith and innocence, to the document under which alone Rheault was enabled to oust the plaintiff, broke the implied agreement for quiet enjoyment to which the plaintiff was entitled.

In the case of a contract, of course, it is of no importance, with what intention the act is done which breaks the contract—the other contracting party is not concerned with the intention, but only with the act and its consequences; a man breaking his contract with the best and holiest of motives does as much harm as one who so acts under the influence and at the command of Satan himself; the road to damages is not infrequently paved with good intentions.

I think, therefore, that the action rightly lies; I do not think that the damages awarded are excessive—and, indeed, it is not alleged in the notice of appeal that they are (except indefinitely).

I would dismiss the appeal with costs.

FISHER, J.A., agreed with RIDDELL, J.A.

ORDE, J.A.:—This case presents some unusual features, but, when the essential facts are understood, the principles to be applied are simple.

The defendant was at one time the registered owner in fee of lot 25 on plan M. 25, Temiskaming, now in the office of Land Titles at Cochrane, and in or about 1921 he sold the lot to one Botley, but no transfer or conveyance was to be made until Botley paid in full.

Payment was duly made in 1923, but, instead of conveying to Botley, Cochlin at Botley's request executed and delivered the transfer, in accordance with the Land Titles Act, to one Joseph Bourcier, who had purchased from Botley. Bourcier did not register the transfer.

On the 5th July, 1924, Bourcier sold the lot to the plaintiff for \$600, of which \$200 was paid in cash and the balance by the delivery to Bourcier of certain horses and cattle, Bourcier and his wife executing and delivering to the plaintiff a formal transfer thereof under the Land Titles Act. At the same time Bourcier delivered to the plaintiff his transfer from the defendant. The plaintiff retained the transfers, but did not register them. He also took immediate possession of the land, and rented it to a tenant.

The defendant, who is a Justice of the Peace at Ramore, in the district of Cochrane, was fully aware of the sale by Bourcier

to the plaintiff. The plaintiff swears that the discussion with the Bourciers took place in the defendant's house and in the defendant's presence. The defendant took the affidavit of execution, Bourcier's affidavit and also that of the plaintiff, appended to the transfer, and, notwithstanding his denial of any knowledge of the nature of the transaction, the finding of the learned trial Judge that he knew is amply supported by the evidence.

The plaintiff's tenant left the land soon afterwards, and the place remained vacant until after Bourcier's death in September, 1924, when his widow took possession. There appears to have been some dispute between Mrs. Bourcier and the plaintiff as to the full payment of the consideration for the sale by Bourcier to the plaintiff, with which this action has nothing to do.

In 1925 Mrs. Bourcier sold the lot to one Rheault, and, in order to give him a title, in some way persuaded the defendant, in whose name the registered title still stood, because of the plaintiff's failure to register the two transfers in his possession, to execute a transfer to Rheault. Rheault registered the transfer and became the registered owner of the land. The defendant tried to explain his execution of this transfer by saying that he thought he was witnessing some document, but his evidence is hardly credible, especially as his wife also signed it to bar her dower. Whether he really knew or not is immaterial. If otherwise liable for having deprived the plaintiff of his land the defendant cannot escape by any such silly explanation as that.

The plaintiff claims the recovery of the land, which of course he cannot get in the absence of Rheault as a party, and in the alternative damages. The learned trial Judge has found for the plaintiff and fixed the damages at \$600, with interest from the issue of the writ. The defendant now appeals. There is no cross-appeal.

The situation in which the two parties find themselves is simple enough. The defendant in effect sells and conveys to Bourcier. Bourcier, with the defendant's knowledge, sells and conveys to the plaintiff. The two conveyances are not registered; and the defendant, well knowing that he has no longer any interest in the land and that the plaintiff is the true owner, executes a conveyance to Rheault, and thereby wrongfully deprives the plaintiff of his title.

Assuming that Rheault purchased for value, in good faith and without notice, it is of course plain that the plaintiff cannot recover the land and must confine himself to damages if they can be recovered.

Are damages recoverable from Cochlin or must the plaintiff's remedy be limited to the legal personal representatives of Bourcier, his immediate vendor?

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It is odd how little direct authority can be found for the solution of what would appear to be a simple problem. The absence of any registration or land titles system in England, applicable to all lands, probably accounts for the dearth of direct English authority. But I think the principles applicable are plain and that the judgment of the learned District Court Judge may be supported upon three distinct grounds.

There is first that discussed by my brother Riddell: obligation on the part of the vendor of land not to interfere with the quiet enjoyment of the purchaser or of those claiming under him, implied in the agreement of sale itself. I do not think it necessary to add anything to what my learned brother has said upon that point.

There is also the tortious nature of the defendant's act, which is the ground upon which the trial Judge has based his judgment. Very little authority was cited on the argument bearing directly upon this aspect of the problem, but it seems to me on principle that at common law an action on the case would lie for damages against one who by his power of disposition over land had wrongfully deprived the true owner of his title. It was held by Mowat, V.-C., in *McLennan v. McDonald* (1871), 18 Gr. 502, that a purchaser who knows that his vendor has in fact conveyed the land to some other person and who attempts to gain priority under the Registry Act against the true owner, by registering his conveyance first, is really guilty of a fraud, even though he may not know who the true owner may be at the time. The true owner in that case was granted a decree setting aside the second conveyance as fraudulent and void because of the grantee's knowledge of the earlier conveyance.

The principle of that case was touched upon in the somewhat complicated case of *Savereux v. Tourangeau* (1908), 16 O.L.R. 600. There the Court held that the transaction with the second purchaser could not, in the circumstance, be deemed fraudulent on his part, but that, as he entered into the contract with notice of the rights of the plaintiff under the latter's earlier agreement, he took subject to that and stood in no higher position than the vendor.

If in *McLennan v. McDonald* it was a fraud for the second purchaser to take a conveyance with knowledge of the earlier one, it was *à fortiori* a fraudulent or wrongful act for the vendor to have executed it, and the tortious nature of the vendor's act would not be in any degree diminished but would rather be increased if the second purchaser was acting in good faith and without notice of the earlier conveyance. If this conclusion is sound, then the defendant here was guilty of a tort in executing the

transfer to Rheault, knowing that Bourcier had parted with his title to the plaintiff, and that he was thereby enabling Rheault by prior registration to destroy the plaintiff's title.

The third ground is, I think, on principle the strongest and most satisfactory. The relative positions of the parties to a contract for the sale of lands, before conveyance, are in equity those of trustee and *cestui que trust*. "When a contract is made for sale of an estate, equity considers the vendor as a trustee for the purchaser of the estate sold:" Sugden on Vendors and Purchasers, 14th ed. (1862), p. 175. This is of course elementary, but the principle has a direct bearing upon the question raised in this action. As the registered owner, Cochlin had an absolute estate in fee simple in the land. By sec. 37 of the Land Titles Act, now R.S.O. 1927, ch. 158, a registered owner may transfer the land, but until the entry of such transfer is made on the register "the transferor shall be deemed to remain owner of the land." By sec. 68, only the registered owner may transfer or charge registered lands, but subsec. 2 expressly provides that, "Subject to the maintenance of the estate and right of such owner any person having a sufficient estate or interest in the land may create estates, rights, interests and equities in the same manner as he might do if the land were not registered."

This provision recognises the existence of unregistered estates, and from it I think it is plain that the execution and delivery of a transfer created such estate, right, interest, and equity in the transferee. When the absolute owner transfers his whole estate the equities immediately created are identical with those arising from an uncompleted contract of sale. The transferor, by virtue of sec. 37 of the Act, still holds the legal estate, but the transferee is in equity the real owner, for whom and for all those claiming under him the transferor holds the legal estate in trust. I can see no distinction in principle between the situation thus arising under the Land Titles Act and that resulting from an ordinary contract of sale. In the present case Cochlin held the legal estate or the statutory ownership in trust for Guest as Bourcier's transferee. When he transferred that legal estate or ownership to Rheault, he was guilty of a breach of trust for which he must answer. He executed the second transfer knowing that Bourcier had transferred to Guest, so that his breach of trust was real, and not in any sense technical, and he must indemnify the plaintiff for his loss.

The appeal should be dismissed.

LATCHFORD, C.J., agreed with ORDE, J.A.

Appeal dismissed with costs.

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May 3.

PRICEVILLE Fox Co. v. JORDAN.

Company—Contract—Bailment—Breach—Failure to Prove Demand—Directors—Resolution—Payment of Dividends in Specie—Breach of Trust—Company Having Assets of a “Wasting Character”—Companies Act, R.S.O. 1927, ch. 218, sec. 97(2), (4)—Payments of Dividends in Cash—Whether Ratable Distribution—Diminishing Capital—Repayment by Directors of Sums Improperly Received.

The defendant was a promoter and became a director of the plaintiff company. Shortly after its incorporation he entered into an agreement with it whereby, in consideration of the issue to him of 240 fully paid-up shares, he agreed to sell and the company agreed to buy 20 pairs of foxes for \$24,000. The agreement recited that the company had requested him to keep in his care and control 5 pairs of the 20, and to deliver the same with their increase to the company on demand before a named day. The defendant delivered only 3 of the 5 pairs, and the company sued (*inter alia*) for the value of the other 2:—

Held, that when a promise is conditioned upon a request or demand the request or demand must be proved in an action for breach; here there was no evidence of a demand or of a waiver of the condition; and this claim against the defendant as bailee should be dismissed.

2. A resolution of the directors of the company was passed on the 10th July, 1922, the defendant being then a director of the company, to the effect that the “increase of pups” for the season of 1922 be divided as follows: the keeper to take one-quarter for care and feeding, etc.; the defendant and his brother (also a director) to “take foxes according to their percentage of holdings in the company; the balance to be sold to pay dividends to the shareholders.” In pursuance of the resolution the defendant received 4 foxes; and the plaintiff company, charging misfeasance, breach of trust, and wrongful conversion of its assets, claimed the value of the 4 animals:—

Held, that the resolution was not a valid declaration of a dividend; for it is of the essence of a dividend that it shall apply ratably to all shareholders of the same class, except where shares are paid-up in differing amounts.

Nor could the resolution be justified as a distribution in specie under sec. 97 (2) and (4) of the Ontario Companies Act.

What the statute means by a company whose assets are of a “wasting character” is a company *eiusdem generis* with a mining company.

3. By a resolution of the directors passed in 1923, a 10 per cent. dividend was declared “on stocks sold in season 1922;” and in pursuance thereof \$540 was paid out:—

Held, that this resolution did not provide for a ratable distribution among all the holders of common shares; and was also invalid because it diminished the capital of the company.

The defendant was liable for the \$540, but if anything had been recovered on this head from other directors, the amount should be deducted.

THE following statement is taken from the judgment of RIDDELL, J.A.:—

The defendant lives in Prince Edward Island and is in the fox-raising business. He took part with others in having the plaintiff company incorporated in 1921, and became one of the directors of it. On the 21st November, 1921, he entered into an agreement with the company, wherein it was recited that he had agreed to sell and the company to buy 20 pairs of foxes for \$24,000, to be paid by the issue of 240 fully paid-up shares, and that he had delivered 15 pairs, and the company had requested him to "keep in his care and control the remaining 5 pairs of foxes, the same to be delivered with their increase to the company on demand before the 15th day of July, 1922." The contract reads:—

"Now therefore this agreement witnesseth that the party of the first part hereby transfers all his right title and interest in the said 20 pairs of foxes to the said company and the party of the second part hereby agrees to have issued to the said party of the first part or his nominee 240 shares of the capital stock in this company in payment therefor and to accept delivery of the said 5 pairs of foxes being now set apart as the property of the 1922.

"The party of the first part hereby agrees to ranch and care for the said 5 pairs of foxes and their increase until the 15th day of July, 1922, but solely at the risk of the said company, the said 5 pairs of foxes being now set apart as the property of the said company."

This, be it noted, is the whole of the operative part of the contract.

It is said that he delivered only 3 of the 5 pairs, and this action is, in part, for the value of the other two pairs.

Then it is asserted that, being a director of the company, he paid to himself out of the capital of the company 4 foxes worth \$160; and, moreover, while such director, he took part in giving to the shareholders out of the capital of the company the sum of \$540.

The action was tried before WRIGHT, J., without a jury. He held the defendant liable on all grounds; and the defendant appealed.

February 19. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

J. J. Gray, for the appellant, argued that he was not guilty of any breach of contract in not delivering the two pairs of foxes. He was merely a bailee of these foxes for the plaintiff company, and it was incumbent on the plaintiff company to demand delivery of these foxes and to prove refusal of the demand: *Gledstane v.*

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Hewitt (1831), 1 Cr. & J. 565. The appellant was not obliged to transport these foxes to Ontario in order to deliver them. As to the receipt by the appellant of 4 foxes by way of dividend, it was within the powers of the company, because the assets of the company were of a wasting character, to declare a dividend out of its funds so long as the remaining assets were sufficient to meet all liabilities exclusive of nominal paid-up capital, and to pay such dividend in kind: Companies Act, R.S.O. 1927, ch. 218, sec. 97(2); *Verner v. General and Commercial Investment Trust*, [1894] 2 Ch. 239; *Dovey v. Cory*. [1901] A.C. 477, at p. 493; *Ammonia Soda Co. Ltd. v. Chamberlain*, [1918] 1 Ch. 266, at pp. 284-286; *Lawrence v. West Somerset Mineral Railway Co.*, [1918] 2 Ch. 250; *Wall v. London and Provincial Trust Ltd.*, [1920] 1 Ch. 45. Neither was the appellant liable for joining in the payment of dividends in cash of \$540 to others, because of the same fact, namely, that the assets were wasting.

M. H. Ludwig, K.C., for the plaintiff company, respondent, contended that the learned Judge below was right in finding the appellant liable for breach of contract in regard to the two pairs of foxes undelivered. The receipt of four foxes by the appellant by way of dividend was illegal, and the appellant was thereby guilty of misfeasance and breach of trust as a director. Dividends could only be paid in cash. The term "assets of a wasting character" was not applicable to this kind of a company. The payment of \$540 in cash by way of dividend was illegal because it impaired the capital of the company, and the appellant was responsible as a director for this depletion of the company's assets.

May 3. RIDDELL, J.A. (after setting out the facts as above):—As to the first ground, it is said that there is no evidence of a demand for the two pairs of foxes. This is true; and the manager for the company says that he made inquiry as to why they were not delivered and the explanation was satisfactory to him. He was not allowed, even on cross-examination, to state what the explanation was—by reason of the objection of the plaintiff company; but, in view of the statement which he was allowed to make that there is always a large fatality in the ordinary course of ranching, especially in these days, it is not difficult to conjecture what the explanation was. In view of the strictness with which the defendant was bound in his cross-examination, there can be no hardship in holding the plaintiff company to prove its case strictly. The defendant was not bound to deliver unless and until a demand was made; and, if and when such a demand was made, he had the right to shew that the foxes had died, thereby relieving him of the liability to deliver. There is no evidence of

a waiver, as to these foxes, of the condition precedent; and the law has been settled for more than 20 years that when a promise is conditioned upon a request or demand the request or demand must be proved in an action for breach: *Birks v. Trippet* (1666), 1 Wms. Saund. 32; *Nicholl v. Bromley* (1821), 2 Brod. & Bing. 464; *Topham v. Braddick* (1809), 1 Taunt. 572—and this is undoubtedly the case where there is a bailment for safe-keeping, etc.: *Wilkinson v. Verity* (1871), L.R. 6 C.P. 206; *Miller v. Dell*, [1891] 1 Q.B. 468.

The judgment rendering the defendant liable for the foxes he took for a dividend is justified.

As to the \$540 improperly paid out for dividends, apparently other actions have been brought, but we have no evidence of the result. It would be obviously improper to allow the company to receive from this defendant the whole amount if it has already received part from another director; and, if the defendant is so advised, he should have a reference, at his own peril as to costs, to determine what, if anything, has been so recovered; and the amount so recovered should be deducted from the \$540. If such reference be had, the costs should be in the discretion of the Master.

I would allow the appeal in part and dismiss it in part, according to the above findings of law; and, as the success is divided, I should allow no costs in this Court. In the Court below, the plaintiff company should have half its costs without set-off.

MASTEN, J.A.—The statement of claim alleges three distinct causes of action: first, breach of contract; second, wrongful conversion of certain of the plaintiff company's assets; third, breach of duty as a director of the plaintiff company.

I deal with the questions in the order stated above.

The defendant was a promoter of the plaintiff company, and shortly after its incorporation entered into an agreement with it, dated the 21st November, 1921, whereby he sold to the plaintiff company 20 pairs of foxes, in consideration of the issue to him of 240 shares of the capital stock of the plaintiff company, fully paid.

[The learned Justice of Appeal then set out the provisions of the agreement as above.]

The shares were duly issued to the defendant. The 20 pairs of foxes were accepted by the plaintiff company in pursuance of the contract, and the property in them passed to the plaintiff company. Thereafter the defendant became the bailee of the 5 pairs which were not at that time removed from Prince Edward Island to Ontario.

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Under the terms of the agreement, the defendant's duty was to ranch and care for these foxes, but, under the terms of the agreement, no duty devolved on him to transport them to Ontario and deliver them there to the plaintiff company. Apart from any special terms of the contract, his legal obligation as a bailee was merely to keep them safe and deliver them to his bailor when called for. The provision in the contract whereby the plaintiff company agrees "to accept delivery of the said 5 pairs of foxes with their increase before the 15th day of July, 1922," is an obligation on the part of the company to put an end to the duty of the defendant as bailee on or before the 15th July, and does not, in my opinion, import any obligation on the part of the defendant to transport these foxes to Ontario and tender them there to the plaintiff company.

In order to establish this cause of action, it was incumbent upon the plaintiff company as bailor to make a demand on the defendant for delivery of the two pairs of foxes sued for, and to establish wrongful refusal or neglect on the part of the defendant to comply with such demand.

No action will lie against a bailee for a refusal to redeliver the chattel bailed to the bailor until after a demand has been made by the bailor for its return: *Cullen v. Barclay* (1881), 10 L.R. Ir. 224. In order to succeed in such an action the bailor must prove that he is entitled to the delivery of the chattel, and that the bailee is wrongfully detaining it: *Gledstane v. Hewitt*, 1 Cr. & J. 565.

No evidence of such a demand by the plaintiff company is given, and if such evidence had been given for the plaintiff company it would have been open to the defendant to give evidence of any lawful excuse why the two pairs were not forthcoming, but the plaintiff company's evidence did not go far enough to call for any such evidence in defence. On this branch the appeal should be allowed.

The second claim of the plaintiff company is set forth in the 6th and 7th paragraphs of the claim as follows:—

"6. At a meeting of directors of the plaintiff company, held on the 10th day of July, 1922, and whilst the defendant was a director of the company, it was moved by one F. G. Jordan, a brother of the defendant, and a resolution was passed, that the said F. G. Jordan and the defendant be given foxes by way of dividend in respect of shares in the plaintiff company owned by the defendant, and that in pursuance of the said resolution the defendant illegally received 4 black foxes, the property of the plaintiff, of the value of \$1,600.

"7. The defendant was guilty of misfeasance and breach of trust in his duty in his office as a director of the plaintiff company in illegally authorising, sanctioning, and permitting his brother F. G. Jordan and himself to receive the 4 black foxes mentioned in the immediately preceding paragraph."

The resolution referred to in the statement of claim, as above quoted, reads as follows:—

"Moved by F. G. Jordan, seconded by Karsted, that the following division of the increase of pups from above ranch for season of 1922 be as follows: the keeper to take one-quarter of pups as agreed for keeping, care, feeding, etc., and all incidental expenses, and that Jordan Brothers take foxes according to their percentage of holdings in the above company, the balance to be sold to pay dividends to the shareholders."

This resolution was passed at the meeting of directors held on the 10th July, 1922.

It is plain that the above is not a valid declaration of a dividend in any sense. It is in fact a voluntary giving away to Jordan Brothers of the property of the company without making any provision for other shareholders. Such a resolution cannot possibly amount to a declaration of dividend. It has long been settled that, in the absence of express authority, dividends must be paid in cash: *Hoole v. Great Western Railway Co.* (1867), L.R. 3 Ch. 262.

Mr. Gray, for the appellant, attempted to justify the above distribution in specie under the provisions of subsec. 2 of sec. 97 of the Ontario Companies Act, claiming that this was *such* a company as is referred to in subsec. 4 of sec. 97, because its assets were, as he claims, of a *wasting* character. I am clearly of opinion that what the statute means by a company whose assets are of a wasting character is a company *ejusdem generis* with a mining company, for example, a company operating a quarry or a salt-well. Nor does this argument harmonise with Mr. Gray's other contention that the justification for any distribution arose from the accretion to capital resulting from natural increase of foxes. But, further, it is of the essence of a dividend that it shall apply ratably to all shareholders of the same class, except where shares are paid up in differing amounts and the by-laws make provision for dividends in proportion to the percentage paid upon shares.

The trial Judge found the defendant liable for the value of these 4 foxes, and I am in agreement with his judgment. On this branch the appeal should be dismissed.

I turn now to the third branch of the plaintiff company's claim, namely, that \$540 of the plaintiff company's money was

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App. Div. paid out to certain shareholders by way of dividend contrary to
1929. the provisions of sec. 97 of the Ontario Companies Act, inasmuch
 PRICEVILLE as it diminished the capital of the company, and that the defendant
 Fox Co. as a director concurring in such depletion of capital is liable
 v. to recoup the same to the company.

JORDAN. The resolution pursuant to which the assumed dividend was
 Masten, paid was passed on the 5th March, 1923, and is as follows:—
 J.A.

“Moved by the president, F. G. Jordan, seconded by Mr. John McGillivray, that 10 per cent. dividend be declared on stocks sold in season 1922. Carried.”

In the same way as in the second claim just discussed, this assumed dividend is subject to the infirmity that it relates only to certain holders of common shares and is not a ratable distribution among all the holders of common shares.

But, in addition to that defect, I see no reason for differing from the finding of the trial Judge that this declaration was unwarranted because it diminished the capital of the company. While the evidence is not precise as to the exact position of the company's finances on the date when the dividend was declared, yet the evidence, taken altogether, is such that I am quite unable to say that the trial Judge was wrong in basing his judgment on a finding that this payment purporting to be by way of dividend did diminish the capital of the company.

On this branch I agree with the result proposed by my brother Riddell.

Success being divided, there should, in my opinion, be no costs of this appeal.

LATCHFORD, C.J., and ORDE and FISHER, JJ.A., agreed with MASTEN, J.A.

Appeal allowed in part without costs.

[APPELLATE DIVISION.]

1929.

ROSS v. GRAY COACH LINES LTD.

May 6.

Negligence—Motor-vehicle upon Highway — Injury to Pedestrian — Findings of Jury—Failure of Defendants to Shew that Accident did not Arise from Negligence of Driver—Highway Traffic Act, R.S.O. 1927, ch. 251, sec. 42—Onus—No Necessity for Affirmative Proof of Particular Negligence—Evidence—Appeal.

The plaintiff was struck and injured by a motor-vehicle of the defendants when attempting to cross a city street on foot, and brought

this action to recover damages for her injury. At the trial the jury found (1) that the defendant company had failed to shew that the accident did not arise from the negligence or improper conduct of the driver of the vehicle; and (2), in answer to the question, "If it has not, in what did such negligence consist?" found that the defendants' driver did not exercise sufficient caution in turning from one street to another "or proper safety regarding pedestrians." Upon appeal from a judgment in favour of the plaintiff, the defendants contended that the answer to the second question was vague and unsatisfactory and amounted in fact to a general verdict:—

Held, that under sec. 42 of the Highway Traffic Act the onus of proof that the loss or damage did not arise through the negligence or improper conduct of the driver or owner of the motor-vehicle was upon the defendants; and the plaintiff was not called upon to shew affirmatively what negligence on the part of the driver actually existed.

And, upon the evidence, it could not be said that the first finding of the jury was one which ought not to be sustained upon appeal.

AN appeal by the defendants from the judgment of the County Court of the County of York (O'CONNELL, Jun. Co. C.J.), in favour of the plaintiff, upon the findings of a jury, for the recovery of \$600 damages for personal injury and loss sustained by the plaintiff when struck upon a street in the city of Toronto by a motor-bus of the defendants, owing, as found, to the fault of the defendants' servant, the driver of the motor-bus. The plaintiff asked for a dismissal of the action upon the findings of the jury or for a new trial.

March 12. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and MIDDLETON, J.J.A.

D. L. McCarthy, K.C., for the appellants.

J. W. Carrick, for the plaintiff, respondent.

May 6. The judgment of the Court was read by MIDDLETON, J.A.:—The plaintiff, while walking south on the west side of Yonge-street, started to cross Adelaide-street, the traffic signal indicating that she had the right to proceed across that street. When she was about half-way across the street, the signal turned and at that moment a motor-bus, operated by the defendants, was about to turn from Yonge-street westerly along Adelaide-street. It is said that the plaintiff, being confronted with the change of signal and the approaching traffic going easterly along Adelaide-street, stopped and stepped backward. She was at any rate struck before the turn was completed by the first part of the motor-bus, and injured.

On the trial of the action, questions were submitted to the jury, and the jury found that the defendant company had failed to satisfy them that the accident did not arise through the negligence or improper conduct of the driver of the motor-bus. A second

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question was asked: "If it has not, in what did such negligence consist?" To which the answer was given: "Defendants' driver Wiseman did not exercise sufficient caution in turning from Yonge-street to Adelaide-street or proper safety regarding pedestrians." Further questions were asked as to the plaintiff's own negligence, and it was found that she was negligent in not remaining stationary at the place which she had reached upon crossing when the signal changed. This negligence was assessed at 40 per cent. and the driver's negligence at 60 per cent., and the \$,1000 found as the amount of damage sustained was apportioned so that the plaintiff recovered \$600.

The appeal to this Court is based upon the vagueness and unsatisfactory character of the answer to the second question which I have quoted. This is put in various ways. First, the negligence found is insufficient as a matter of law; secondly, the answer is equivalent to a general verdict and is an evasion of the specific question put, and an attempt on the part of the jury to hide their inability to make a specific finding of negligence against the defendants.

The argument, I think, fails to appreciate the full effect of the provisions of the Highway Traffic Act, R.S.O. 1927, ch. 251, sec. 42, which provides that when loss or damage is sustained by any person by reason of a motor-vehicle on a highway the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor-vehicle shall be upon the owner or driver.

The effect of the argument presented by the defendants would be to nullify this statutory provision, and would cast upon the plaintiff the onus of establishing negligence on the part of the defendants. If the defendants, *prima facie* liable, fail to satisfy the jury that the accident did not arise through the negligence or improper conduct of the driver, the plaintiff is not called upon to shew affirmatively what negligence on the part of the driver actually did exist. It is sufficient to enable the plaintiff to recover, that the defendants have failed to discharge the onus cast upon them by the statute.

This does not necessarily dispose of the appeal, for it was strenuously argued upon the whole case that the plaintiff was clearly the author of her own misfortune. Had I been trying the case in the first instance, I might well have come to that conclusion, but I cannot say that the verdict which the jury actually rendered is one which ought not to be sustained upon appeal. In my view, it cannot be safely interfered with.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

REX V. AUGER.

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May 6.

Criminal Law—Rape—Defence—Consent of Prosecutrix—Evidence—Corroboration—Judge's Charge—Nondirection—Miscarriage of Justice—Criminal Code, sec. 1014.

Upon the trial of the prisoner for rape, the vital issue was consent or non-consent, and the only evidence of non-consent was that of the prosecutrix, so that her evidence on the vital issue was uncorroborated:—

Held, by the majority of the Court, that, while the jury might have convicted upon the uncorroborated evidence of the prosecutrix, it was the duty of the trial Judge to direct their attention to the absence of corroboration, the danger of convicting on her uncorroborated testimony, and therefore the necessity of their exercising great care in determining the weight to be attached to her evidence.

His not having done so was nondirection, equivalent in its legal effect to misdirection, and constituted a miscarriage of justice, within the meaning of sec. 1014 of the Criminal Code.

Brooks v. The King, [1927] S.C.R. 633, and *Rex v. Salman* (1924), 18 Cr. App. R. 50, followed.

And this afforded ground for setting aside the conviction and directing a new trial, although counsel for the accused at the trial had failed to ask the Judge so to instruct the jury.

Rex v. Blythe (1909), 19 O.L.R. 386, followed.

Per Magee and Hodgins, J.J.A.:—In the circumstances of the case, the Judge was not bound to warn the jury formally of the danger of convicting. If any rule requires him to do so, it is not applicable where there is corroboration. The accused did not enter the witness-box to deny the story of the prosecutrix, and that was corroboration and there was other corroboration of her story. There was evidence of speedy complaint by the prosecutrix to her aunt, and that evidence (although the complaint was elicited by questioning) was admissible to shew the consistency of the conduct of the prosecutrix with the story told by her in the box, and as being inconsistent with her consent to that of which she complained.

Rex v. Norcott, [1917] 1 K.B. 347, and *Rex v. Lovell* (1923), 17 Cr. App. R. 163, referred to.

Per Middleton, J.A.:—The fact that the accused is not called to deny the charges made is not in itself corroboration: *Rex v. Blatherwick* (1911), 6 Cr. App. R. 281. The evidence as to complaint was properly admitted, not as in itself proof of the truth of the facts stated, but as some evidence that the story of the prosecutrix in the witness-box was probably true: *Rex v. Norcott, supra*.

AN appeal by the accused from his conviction, upon trial before WRIGHT, J., and a jury, at the Ottawa assizes, upon a charge of rape.

April 24, 25, and 26. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

A. G. Slaght, K.C., *Gordon Henderson*, and *R. Mercier*, for the appellant.

I. A. Humphries, K.C., and *A. W. Rogers*, for the Crown.

App. Div. May 6. MULOCK, C.J.O.:—The vital issue was consent or non-consent, and the only evidence of non-consent was that of the prosecutrix; all the rest of the evidence was as consistent with consent as non-consent; thus her evidence on the vital issue was uncorroborated.

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Mulock, C.J.O. Whilst the jury might have convicted upon the uncorroborated evidence of the prosecutrix, it was the duty of the trial Judge to have directed their attention to the absence of corroboration, the danger of conviction on such uncorroborated testimony, and therefore the necessity of their exercising great care in determining the weight to be attached to her evidence. His not having done so was nondirection, equivalent in its legal effect to misdirection, and constituted a miscarriage of justice, within the meaning of sec. 1014 of the Criminal Code: *Brooks v. The King*, [1927] S.C.R. 633: *Rex v. Salman* (1924), 18 Cr. App. R. 50.

Where, as here, it was the duty of the trial Judge to instruct the jury on a matter vital to the defence, his failure to do so is a ground for setting aside the conviction, although counsel for the accused at the trial had failed to ask the Judge so to instruct the jury: *Rex v. Blythe* (1909), 19 O.L.R. 386.

The conviction should be quashed and a new trial had.

MIDDLETON, J.A.:—There is no statute which requires that the evidence of the prosecutrix upon a charge of rape should be corroborated, and the courts have steadily refused to demand corroboration unless it is made necessary by some statute: *Rex v. Blatherwick* (1911), 6 Cr. App. R. 281; but in many cases it is the duty of the Judge, notwithstanding the absence of any statutory requirement, to caution the jury as to the danger of convicting in the absence of any corroboration (*ibid.*) The duty of the Judge in his charge in a case of this kind is well stated in *Rex v. Graham* (1910), 4 Cr. App. R. 218, at pp. 220 and 221:—

“The Judge should explain that the burden of proof is upon the prosecutrix to make out the case to the satisfaction of the jury; that it is dangerous to act upon the evidence of one person . . . the risk of acting upon the evidence of the girl unless corroborated, and at the same time to explain that strictly speaking the law does not require that her evidence should be corroborated, and that if they believed the girl’s evidence they could act upon it.”

In a later case of *Rex v. Salman*, 18 Cr. App. R. 50, it is stated (pp. 51 and 52):—

“Other than that of the prosecutrix, there was no evidence which was inconsistent with consent on her part. There was

therefore no evidence to corroborate the testimony of the girl in a material part, and this fact was not pointed out to the jury in the direction which they received."

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The absence of the necessary warning to the jury in this case may have caused a failure of justice, and is to my mind a very serious matter. I am the more impressed with this view because of the charge as a whole. The learned Judge, in discussing the question of there having been any carnal knowledge of the girl by the accused, pointed out the corroboration of her story from that point of view and emphasised the absence of any motive on her part to fabricate the story claiming that the accused had intercourse with her, unless that was the fact; he, however, failed to point out the different considerations applicable to that part of her evidence in which she stated that the intercourse was without her consent. As to this there was every motive on the part of the prosecutrix to assert that she did not consent. As put in *Rex v. Graham (supra)*, there is ever-present temptation to "untruthfulness in defence of her own character, and women will lie on that point often when the rest of their story is true."

I do not say that there was no corroboration of the girl's story, but I think that the trial Judge should have pointed out that circumstances which corroborated much that she swore to did not corroborate her in respect of the vital points of the case—the absence of consent on her part—and were as consistent with consent as with its absence. I say this because the evidence of complaint here is very weak, and looks much more like the explanations of a girl conscious of her guilt in the transaction than the indignation of a young woman ravished as she alleges. The jury should have had placed before them very clearly all that points to consent and therefore to the innocence of the accused with respect to the charge then being tried, and also to the fact that upon this vital question the evidence of the prosecutrix stood alone, as indeed it must often stand. If after such a charge the jury sees fit to convict, the Court will not interfere.

As to what constitutes corroboration in such cases the law is none too clear. Little can be added to the early statement of Sir Matthew Hale, 1 *Pleas of the Crown*, p. 635, a classic statement: "It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished . . . but it must be remembered that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent."

Concerning corroboration it is said (p. 633): "The party ravished may give evidence upon oath, and is in law a competent

App. Div. witness; but the credibility of her testimony, and how far forth
1929. she is to be believed, must be left to the jury, and is more or less
REX credible according to the circumstances of fact that concur in that
v. AUCER. testimony. For instance, if the witness be of good fame, if she
Middleton, presently discovered the offence, made pursuit after the offender,
J.A. shewed circumstances and signs of the injury, whereof many are
of that nature that only women are the most proper examiners and
inspectors, if the place wherein the fact was done was remote from
people, inhabitants or passengers, if the offender fled for it; these
and the like are concurring evidences to give greater probability to
her testimony, when proved by others as well as herself. But on
the other side, if she concealed the injury for any considerable
time after she had opportunity to complain; if the place where the
fact was supposed to be committed were near to inhabitants, or
common recourse or passage of passengers, and she made no outcry
when the fact was supposed to be done, when and where it is
probable she might be heard by others; these and the like circum-
stances carry a strong presumption that her testimony is false or
feigned."

The effect of complaint was discussed at great length in the cases of *Regina v. Lillyman*, [1896] 2 Q.B. 167, and *Rex v. Osborne*, [1905] 1 K.B. 551. In the latter case the admissibility of the complaint and the ground of complaint was placed upon two grounds, first to shew that the complaint voiced by the prosecutrix in the witness-box was of no new origin, but had been consistently made ever since the occurrence complained of, and secondly because the complaint freshly made was inconsistent with consent. These cases were considered in *Rex v. Norcott*, [1917] 1 K.B. 347. The result of the authorities is that the evidence is admitted not as in itself proof of the truth of the facts stated by the complainant, but "as some evidence that her story in the witness-box is probably true" ([1917] 1 K.B. at p. 350). Evidence of this kind, it seems to me, might well be called corroborative in that it appreciably assists the judicial mind in accepting the main evidence as itself worthy of credit; an expression often used in cases in which the statute does not require "corroboration implicating the accused."

In *Rex v. Lovell* (1923), 17 Cr. App. R. 163, 129 L.T.R. 638, the use of the word "corroboration" with respect to evidence of this class is objected to. The evidence is said to be corroborative of the complainant's credibility rather than corroborative of her testimony. In the absence of statutory requirement as to corroboration, this is precisely what I think is required, and such evidence cannot be disregarded, as in cases where statutory corroboration is necessary, when it is probably insufficient: *Rex v. Elliott* (1928), 62 O.L.R. 1.

It was suggested that the fact that the accused was not called to deny the charges made was in itself corroboration. I do not agree with this view, because this was definitely rejected in *Rex v. Blatherwick (supra)*, and because I think the general principle recognised in *Director of Public Prosecutions v. Christie* (1914), 30 Times L.R. 471, shews that this is not so. Silence, except in circumstances which imply assent, is not evidence.

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Upon the argument of this appeal, objection was taken to the admissibility of the complaint upon the ground that it was not voluntary but told in answer to the aunt's persuasion. I think the evidence was properly admitted upon the grounds stated in *Rex v. Norcott*, [1917] 1 K.B. at p. 350, "that she may have been persuaded to tell her unassisted and unvarnished story is no reason why the evidence of her having made the statement should be rejected."

For these reasons I concur in the judgment of my Lord the Chief Justice.

GRANT, J.A., also agreed with the Chief Justice.

MAGEE, J.A.:—The accused appeals from his conviction on a count charging him with rape. The indictment contained two counts, the other one charging him under sec. 211 of the Criminal Code with seduction of a girl under eighteen years of age. At the instance of his counsel, he was tried only on the first mentioned charge. He did not testify on his own behalf. It is not disputed on this appeal that the jury could reasonably come to the conclusion that he was guilty, but it is said the jury was not properly or sufficiently instructed by the learned trial Judge. In particular it is said that the jurors should have had it impressed upon them that it is unsafe to convict on such a charge upon the uncorroborated evidence of the woman against whom the offence is committed, although it is within their province to do so if satisfied of her truthfulness, but that her evidence is to be scrutinised with the greatest care. In effect it is contended that her evidence is to be put upon the same level as that of an accomplice; that is, it should be treated as would the evidence of one who admits his criminality or whose criminality is proved. I cannot agree that any such direction should be called for in the case of a woman who is attacked any more than in the case of a man who is robbed or wounded when alone. Where there is contradictory evidence it is proper and necessary, as indeed it generally is, to remind the jurors that the burden of establishing guilt is on the prosecution and that the offence must be proved to their satisfaction beyond a

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1929. of the accused.

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In several cases of sexual offences the courts have said that the jury should have been warned of the danger of accepting the uncorroborated evidence of the female, but in each case the circumstances called for such a warning, as in *Rex v. Brown* (1910), 6 Cr. App. R. 24, where the Court considered she was an accomplice or at least an abandoned character and the prisoner contradicted her; and in *Rex v. Graham*, 4 Cr. App. R. 218, where the accused testified denying the offence and the Court said one was swearing to one thing and the other to another thing. In *Rex v. Salman*, 18 Cr. App. R. 50, the accused was called and denied guilt.

Here there were no circumstances calling for the singling out of the young girl attacked as one whose evidence should be dealt with differently from that of any other witness testifying to an offence of personal violence and who was practically uncontradicted.

The learned trial Judge was careful to impress upon the jury several times that the prosecution must convince them beyond a reasonable doubt of the prisoner's guilt, and if they had not been satisfied beyond reasonable doubt it was their duty to acquit. He told the jury that the girl herself and she alone could say that it was the accused who had intercourse with her, and he invited them to test and weigh her story and her conduct before and after and "all round," and he was also careful to point out to the jury that her statements to her relative on reaching home were not corroboration of her evidence but only tended to shew the consistency of her conduct, and reminded them that the accusation was not one of having carnal knowledge of a girl but of having knowledge without her consent, and he invited the jury to weigh and consider the conduct of each of the two in determining whether or not it had been proved that the intercourse was without her consent.

The learned Judge dealt with the various material contentions set up by the prisoner's counsel, and I see no reason to think that the case was not as fully and fairly presented to the jury as was called for by the evidence and circumstances.

Objection was taken to the admission in evidence of the girl's statements to her relative as not being voluntary but induced by questioning, but the evidence comes well within the ruling in *Rex v. Norcott*, 12 Cr. App. R. 166, [1917] 1 K.B. 347, that pressure to state the cause of mental disturbance is not an inducement invalidating the complaint as evidence in case of a sexual offence. I may add that if the girl in this case had been in fact a

consenting party she apparently had every motive to make no complaint.

There were minor objections taken here to the learned Judge's charge to the jury, none of them being in my view tenable. As the majority of this Court considers that a new trial should be had, I do not deal with those objections nor with the details of the evidence as bearing on the verdict.

I would dismiss the appeal.

HODGINS, J.A.:—The prisoner did not testify on his own behalf, and his failure to do so permitted the jury to draw the inference that he was unable to deny the truth of the accusation made against him: *Rex v. Clark* (1901), 3 O.L.R. 176, 181, per Osler, J.A.: “The Judge was at liberty (as the jury are, though they must not be told so) to draw an inference unfavourable to the prisoner from the fact that he did not testify on his own behalf.” This is corroboration and strong corroboration of the story of the prosecutrix: *Mash v. Darley*, [1914] 3 K.B. 1226 (C.A), where Buckley, L.J., said (p. 1231) :—

“Corroborative evidence, I conceive, may be found either in admissions by the man or inferences properly drawn from the conduct of the man. Admission here, there is none. Conduct there is. Were or were not the justices entitled to take into account as a matter of evidence upon which they might come to some conclusion the fact that the man before the justices told a story, namely, that she was fast and that her condition was due to that state of things, and the fact that when at the assizes he stood in peril and when, if the defence was true, it was to his interest to set it forward, he did not set it forward at all? . . . It appears to me that that was corroborative evidence and that the justices were entitled to take into account that the man so conducted himself as that there was reason from his conduct to infer that the girl's story was presumably true.”

This case is referred to with approval in *Hubin v. Rex*, [1927] S.C.R. 442.

There was, in addition, other corroboration from the doctor as to her physical condition, from her aunt as to her actions and the state of her clothes on her return home on the afternoon of the 17th February, and that the prisoner called up three times on the 17th February to give a message to the prosecutrix to come to his room that afternoon, from Mrs. Latreille to the same effect, from St. George of the fact that the prisoner was in his room in the Parliament Buildings at the material time, in the receipt of a letter by the father which the prosecutrix wrote to gain time, stamped

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App. Div. House of Commons. While corroboration in the strict sense is not necessary, there is quite enough to enable a jury to find against the prisoner on the whole evidence. Where corroboration is necessary, it is only required as to some material part of the crime alleged, and we cannot ignore in the prisoner's favour any corroboration which aids any material part of the whole story told by the prosecutrix.

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The only criticism of the charge which is of any importance is that it failed to disclose any formal warning by the learned trial Judge to the jury that, while they might convict on the girl's evidence in a case of this kind where corroboration was not essential, yet they should not do so without extreme care in weighing her testimony. If this rule exists, which I doubt, its application in this case must be a common sense one, and it can only be made applicable in the absence of corroboration: *pér Hewart, L.C.J.*, in *Rex v. Lovell* (1923), 17 Cr. App. R. 163. Here there is that corroboration. But, if there were none, and where the only evidence is that of the female assaulted, and where the assault is admitted or not put in issue by the accused, and it is sought to deduce from the girl's testimony that she yielded, though perhaps reluctantly, to the ardour of the prisoner, backed by the influence of his social condition and physical strength as contrasted with hers, it seems to me that to insist on a formal warning, as is done here, is to ignore the reason and purpose of the so-called rule as well as its substance.

If the jury convicted the prisoner it could only be on the strength of the story told by the prosecutrix. That was all they had to consider, for the prisoner trusted his reputation and fortune to the hazard of a rather relentless cross-examination instead of pledging his oath to the story which he was asking the jury to infer. Both sides relied on the girl's sworn statement, and it was therefore the duty of the trial Judge to examine closely and lay before the jury clearly its consistency or inconsistency, and if he did this he was doing just what the rule is intended to enforce, and to my mind was in no way bound formally to warn the jury, as is contended.

The so-called rule is of course founded on the fact that an accusation by a woman against a man of a sexual offence is, in the words of Sir Matthew Hale, "easily to be made . . . and harder to be defended" (1 P.C., p. 634). But it can only apply, as I regard it, when there is no corroboration and where there is a denial of its truth and where there is a real issue as to which story to be accepted. In *Rex v. Graham*, 4 Cr. App. R. 218, referred to in *Rex v. Lovell* (*ante*), Channell, J., in delivering the judgment of the Court, said:—

"It is one of those cases in which the Judge should explain that the burden of proof is upon the prosecution to make out the case to the satisfaction of the jury; that it is dangerous to act upon the evidence of one person, and in which the Judge should point out to the jury that they had one person saying one thing and another person another thing."

Here there was no one to dispute the tale told by the girl: merely suggestion, but no real proof of consent. It then became a question of whether the Crown had proved its case or whether the cross-examination of the prosecutrix disclosed matters which raised a reasonable doubt of the prisoner's guilt sufficient to warrant an acquittal.

The evidence of speedy complaint is evidence of the consistency of her story and also cannot be disregarded. No one can read the case of *Rex v. Norcott*, [1917] 1 K.B. 347, without being satisfied that the complaint here made to the aunt was spontaneous and admissible and that it was in itself consistent with the girl's story and as such corroborative of it. See *Rex v. Elliott*, 62 O.L.R. 1, and cases therein discussed. In *Rex v. Lovell*, 17 Cr. App. R. at p. 167, Hewart, L.C.J., says:—

"The complaint can only be used as evidence of the consistency of the conduct of the prosecutrix with the story told by her in the witness-box, and as being inconsistent with her consent to that of which she complains."

In Phipson on Evidence, 6th ed., p. 103, the learned author refers to the *Osborne* case, [1905] 1 K.B. 551, and the *Lillyman* case, [1896] 2 Q.B. 167, as authorities for the statement that the fact and the particulars of the complaint are admissible "to disprove consent where consent is in issue."

The essence of the case was her story; there was no other, and the warning to use due care in considering it when both sides are upholding it—one wholly and the other in part—was fully performed if the trial Judge dealt fairly with the suggestions against its entire acceptance and reminded the jury that the prisoner was entitled to the benefit of any reasonable doubt. If the Judge had a duty in addition to this, it would weigh down the scales unfairly against the woman in that the warning would apply only against her being believed in her accusation and would leave any inconsistency or slip in full force in favour of the man.

The rule cannot be used so as to produce injustice.

In the *Salman* case, 18 Cr. App. R. 50, the defendant gave evidence, and there were two stories to be contrasted, and the warning may have been proper, as there was no evidence to cor-

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App. Div. roborate the girl's testimony in a material particular—a condition entirely different from the case at bar.

1929. I have carefully read and re-read the charge of the learned Judge, and I think he fully discharged his duty both in explaining to the jury the suggestions and improbabilities alleged as reflecting on the truth of the story of the prosecutrix, and as well laying before them the prisoner's defence as outlined by his counsel. I think the remarks of Abbott, C.J., in *Rex v. Sir Francis Burdett* (1820), 4 B. & Ald. 95, 161, 162, might, with propriety, be applied to this case:—

"No person is to be required to explain or contradict until enough has been proved to warrant a reasonable and just conclusion against him, in the absence of explanation or contradiction; but when such proof has been given, and the nature of the case is such as to admit of explanation or contradiction, if the conclusion to which the proof tends be untrue, and the accused offers no explanation or contradiction; can human reason do otherwise than adopt the conclusion to which the proof tends? The premises may lead more or less strongly to the conclusion, and care must be taken not to draw the conclusion hastily; but in matters that regard the conduct of men, the certainty of mathematical demonstration cannot be required or expected; and it is one of the peculiar advantages of our jurisprudence, that the conclusion is to be drawn by the unanimous judgment and conscience of twelve men, conversant with the affairs and business of life, and who know that, where reasonable doubt is entertained, it is their duty to acquit."

I would, therefore, affirm the conviction and dismiss the appeal.

Appeal allowed (MAGEE and HODGINS, J.J.A., dissenting).

[APPELLATE DIVISION.]

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HERRMANN v. CANADIAN NICKEL CO. LTD.

May 14.

Company—Powers of Directors—Sale of Lands—Option-agreement—Companies Act, R.S.O. 1927, ch. 218, sec. 23(1) (m), (o)—"Part of Undertaking" or "Part of Property" — Domestic Proceedings of Company—Presumption—"Omnia Rite Acta."

The defendant company, the owner of mining lands, by an agreement in writing, executed by its president and secretary-treasurer under the company's seal, gave L. an option to purchase a portion of the lands. The plaintiff, a shareholder of the defendant company, sought to have the agreement declared null and void because it was not sanctioned by a by-law of the directors, confirmed by a vote of the

shareholders, as required by sec. 23(m) of the Ontario Companies Act, R.S.O. 1927, ch. 218. It appeared that the directors in fact sanctioned the transaction and by a by-law authorised the president and secretary-treasurer to sell the portion of the lands referred to and to execute documents in connection with any sale, and to affix the company's seal thereto:—

Held, by the majority of the Court, that, no matter whether the sale was of "part of the undertaking" (sec. 23(m)) or only of "part of the property" (sec. 23(o)) of the company, it came within the rule in *Royal British Bank v. Turquand* (1856), 6 E. & B. 327; and the purchaser, having had no notice of any defect in the preliminary domestic proceedings of the company, was entitled to assume that all preliminary meetings had been held and votes passed by the requisite majorities, and that as a result the directors, acting through the president and secretary, under the by-law, were entitled to execute the agreement; and it could not be declared void.

Review of the authorities for the purpose of indicating the extent of the rule and its applicability to the circumstances of the case at bar.

Per RIDDELL, J.A.:—The lands sold were part of the "property" and not of the "undertaking;" and there was no objection to the directors dealing with them as proposed. In the absence of special circumstances, the directors can do anything that the company can do.

AN appeal by the plaintiff from the judgment of LOGIE, J., dated the 2nd April, 1929, dismissing the action.

The following statement is taken from the judgment of MASTEN, J.A.:—

The plaintiff, a shareholder in the Canadian Nickel Company Ltd., sues, on behalf of himself and all other shareholders, for a declaration that a certain option-agreement for the sale by the Canadian Nickel Company to the defendant Leighton, or his nominee, of a portion of the mining lands of the Canadian Nickel Company, is unauthorised and illegal and should be declared null and void and delivered up to be cancelled; and for an injunction restraining the defendants from continuing further operations on the mining lands in question.

The respondent the Canadian Nickel Company Ltd. was the owner of the lands in question.

The respondent George E. Leighton acquired from the Canadian Nickel Company the option to buy the lands in question, and subsequently assigned the same to his co-respondent, McVittie-Graham Mines Ltd.

The option-agreement attacked is dated the 1st June, 1927, and is made between the Canadian Nickel Company Ltd., of the first part, and George E. Leighton, of the city of Montreal, mining engineer, of the second part. On the terms therein set forth it purports to give to Leighton an option to purchase the mining lands

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App. Div. in question for the sum of \$150,000. The option-agreement is
1929. executed by the Canadian Nickel Company Ltd., by its president
HERRMANN and treasurer, under the seal of the company, and the variation in
v. the terms of the option, dated the 25th October, 1927, is executed
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Co. LTD. in a similar form.

This option was thereafter assigned by Leighton to the McVittie-Graham Mines Ltd., who entered into possession of the property in question.

Substantial sums, said by counsel to aggregate about \$60,000, have been paid by the McVittie-Graham Mines Ltd. to the Canadian Nickel Company on account of the purchase-price, and further substantial sums, said to aggregate in the neighbourhood of \$40,000, have been expended by the McVittie-Graham Mines Ltd. in the development of the property.

The statement of claim was delivered on the 4th day of September, 1928. The date of the issue of the writ does not appear from the records furnished to this Court.

May 1 and 2. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, and ORDE, J.J.A.

J. R. L. Starr, K.C., and *S. A. Shoemaker*, for the appellant, argued that the option-agreement was an agreement for a sale of a component part of the undertaking of the defendant company, and therefore was governed by sec. 23(m) of the Companies Act, R.S.O. 1927, ch. 218, and not by sec. 23(o), as found by the learned trial Judge. The option-agreement was null and void, because the sale under it was a sale of the undertaking of the company or a part thereof, and therefore such sale should have been authorised by the vote at a general meeting of a majority of the shareholders holding not less than two-thirds of the issued capital stock, which majority vote was not obtained. Reference to *Re Bailey Cobalt Mines Ltd.* (1920), 47 O.L.R. 13.

R. H. Parmenter, K.C., for the defendants Leighton and McVittie-Graham Mines Ltd., respondents, and *E. B. Titus*, for the defendant the Canadian Nickel Company Ltd., respondent, were not called upon.

May 14. *MASTEN*, J.A. (after stating the facts as above):—Counsel for the appellant supports the claim put forward on his behalf, on the footing that the option in question is absolutely void because, as he contends, it must have been approbated, sanctioned, and directed by a by-law passed by the directors of the Canadian Nickel Company, and such by-law must have been confirmed by the vote of a majority in number of the shareholders

present, or represented by proxy, at a general meeting duly called for considering the matter, and holding not less than two-thirds of the issued capital stock of the company. He contends that, these formalities not having been observed, the option is nugatory, and wholly void.

It is admitted by counsel for the appellant that the board of directors of the Canadian Nickel Company approve the transaction. Further, it appears from the record, and by the admission in the statement of claim of the appellant, that on or about the 21st June, 1912, the directors of the defendant the Canadian Nickel Company Ltd. passed by-law No. 8, which reads as follows:—

“The president and secretary-treasurer are hereby empowered to accept, on behalf of the company, any offer not less than \$60,000 for the property of the company in the township of Drury, and to execute agreements, transfers, deeds and other documents in connection with any sale, and to affix the seal of the company thereto.”

This by-law remains unrepealed, and the option in question provides for a sale of the property for \$150,000 in cash.

The appellant contends that neither this by-law nor any subsequent action leading up to the giving of the option, or confirming it, has ever received the sanction of the shareholders in the manner called for by sec. 23(m) of the Companies Act.

In his judgment the trial Judge says:—

“The fundamental error into which the plaintiff has fallen is the treating of the sale of the mining claims in question as falling within para. (m) of sec. 23 of the Ontario Companies Act, instead of para. (o) . . . I think, therefore, that the sale in question comes under para. (o) and not under para. (m). If made under para. (o), the restrictions contained in para. (m) are not applicable, and the sale is valid. There was no fraud, but a *bonâ fide* sale to an innocent purchaser for value.

Section 23, paras. (m) and (o), of the Companies Act, reads as follows:—

“A company shall possess as incidental and ancillary to the powers set out in the letters patent or supplementary letters patent power to, . . .

(m) sell or dispose of the undertaking of the company or any part thereof for such consideration as the company may think fit, and in particular for shares, debentures or securities of any other company having objects altogether or in part similar to those of the company, if authorised so to do by the vote of a majority in number of shareholders present or represented by proxy, at a general meeting duly called for considering the matter, and hold-

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App. Div. ing not less than two-thirds of the issued capital stock of the
1929. company;

HERRMANN (o) sell, improve, manage, develop, exchange, lease, dispose of,
v. turn to account or otherwise deal with all or any part of the prop-
CANADIAN erty and rights of the company."

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Masten, The opening words of para. (m), "sell or dispose of the under-
J.A. taking of the company *or any part thereof*," raise a difficulty. If I were to hazard a guess as to the scope respectively of these two clauses, (m) and (o), I would suggest that unless the party attacking the transaction satisfies the Court that the proposed sale is for a purpose which is not within the scope of promoting or carrying on the objects of the company as defined in their constituting instruments (but is, for example, directed towards the winding-up of the company) then clause (o) applies; while (m) comes into play only when some branch of the company's chartered activities is to be abandoned.

But, without applying that test to the facts of this case, I prefer to rest my conclusion that the appeal fails on the ground that, no matter which clause applies to this transaction, the rule in *Royal British Bank v. Turquand* (1856), 6 E. & B. 327, governs, and the action fails.

It is unquestionable that under clauses (m) and (o) the company was invested with power to dispose of the lands in question. It is also unquestionable that under the Ontario Companies Act the directors have full power to manage in all respects the affairs of the company, save in so far as that power is expressly limited: R.S.O. 1927, ch. 218, sec. 86; *Mid-West Collieries Ltd. v. McEwen*, [1925] S.C.R. 326.

In the present case, if the sale was effected under para. (o), there is no limitation by the statute of the powers of the directors, though it is said that the power of the directors to sell lands was limited by a by-law, while, if the giving of the option to Leighton falls under clause (m), the exercise of the power is to be preceded by a confirmatory vote of shareholders; but in either case the purchaser had no notice of any defect in the preliminary domestic proceedings of the company and was entitled to assume that all preliminary meetings had been held and votes passed by the requisite majorities, and that as a result the directors, acting through the president and secretary, under by-law 8 above quoted, were entitled to execute the option in question.

The rule in question has for many years been well settled as part of our Ontario law, but for the purpose of indicating its extent and its applicability to the circumstances here existing, it may not be improper to make some reference to the authorities.

In Palmer's Company Precedents, 13th ed., Part I., p. 691, the rule is thus stated:—

"Even where the directors exceed their powers or infringe the restrictions imposed on them, the company may be bound; for an outsider dealing with the company is only bound to see that the transaction is *apparently* regular and consistent with the articles: *Royal British Bank v. Turquand*, 6 E. & B. 327; *Mahony v. East Holiford Mining Co.* (1875), L.R. 7 H.L. 869. He need not go into internal matters, e.g., ascertain that a particular resolution has been passed, that a particular meeting has been duly held, or that particular formalities have been complied with: he is entitled to presume *omnia rite acta*."

I have re-read the cases referred to by Palmer in support of these propositions; they bear out the texts as above quoted, and I refer only to one or two of the decisions which support the statement.

In *Sheppard v. Bonanza Nickel Mining Co. of Sudbury* (1894), 25 O.R. 305, it was held that, where the power to contract exists, a person contracting with the company need not inquire whether the proper formalities of execution by the company have been complied with in a contract under its corporate seal. The appeal was heard before the Chancery Divisional Court, consisting of the late Chancellor Boyd and the late Mr. Justice Thomas Ferguson. In the course of his judgment the Chancellor says (p. 309):—

"The rule established by authority is, that where the proposed dealing is not inconsistent with the constitution of the company, the party contracting need not inquire into the regularity of the internal proceedings. It is to be assumed that all is being done in due course, and the disclosure that such was not the case will not avail to displace or nullify a completed instrument or transaction."

And Ferguson, J., says (p. 310):—

"Then where a party dealing with the company ascertains the existence of power on the part of the company to do the act, that is to make and give him the obligation, he may go on with the dealing without inquiring as to any formalities that may have been prescribed as preliminaries. He may presume, without inquiry, that these have been properly attended to."

In *Montreal and St. Lawrence Light and Power Co. v. Robert*, [1906] A.C. 196, it was held that the company which was buying lands, and which had furnished the vendor with a copy of a resolution of the board of directors authorising the purchase, could not afterwards avoid the transaction by shewing that it had been passed by an insufficient quorum. In regard to that point, Lord Mac-

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"Another point was made on behalf of the company. It seems to have been a mere afterthought, for there is no hint of it before the action was launched. It is said that the meeting of July 17 was irregular: there was not a quorum present; therefore the resolution passed on that occasion was invalid and goes for nothing. It is quite true that the by-laws require the presence of three directors to make a quorum—and only two attended on the 17th. But, after all, the by-laws of a company constituted as the Montreal and St. Lawrence Light and Power Company was constituted are not public property. They concern matters of internal management. Those who deal with the company have no means of access to them, no right to pry into the company's archives or interrogate its officials. There was nothing to put Robert on inquiry. The officials of the company, the president, the secretary, and the notary furnished him with a copy of a resolution which purported to be a resolution of the directors duly and regularly passed. On the faith of that representation Robert altered his position and parted with his property. The company cannot now be heard to say to the vendor: 'You should not have given credit to what our people told you.' If such a plea were listened to, no one would be safe in dealing with a company having private regulations of its own inaccessible to the outside world to which appeal could be made, in case of need, to relieve it from solemn obligations or save it from a bad bargain."

In *County of Gloucester Bank v. Rudry Merthyr and House Coal Colliery Co.*, [1895] 1 Ch. 629, it was held by the Court of Appeal that, where the articles give the directors power to fix the quorum, an outside person who does not know what quorum has in fact been fixed, is entitled to assume that the proper quorum has been properly summoned, and has attended, to effect the completion of a document which purports on the face of it to have been duly executed by the company (p. 633).

So, too, in a similar case, debentures issued under the seal of the company were held to be valid even where they were issued without authority, no directors of the company having been appointed and no resolution to issue debentures passed: *Duck v. Tower Galvanizing Co.*, [1901] 2 K.B. 314, followed with approval by our Court of Appeal in *Johnston v. Wade* (1908), 17 O.L.R. 372, at pp. 378 and 393.

These principles apply equally whether the sale in question was effected under clause (m) or clause (o), for the English de-

cisions which establish the rule were determined in cases where the memorandum and articles of association were public property; and, though persons dealing with the company were held to have notice of the limitations imposed by these instruments, yet they were nevertheless entitled to assume the regularity of all domestic preliminaries. Whether the limitation is imposed on the company by its memorandum and articles or by a statute can make no difference.

The present case well illustrates the difference that often exists between what a careful company conveyancer may prudently seek so as to avoid any possible appearance of irregularity and what the Court will decree when a *bonâ fide* transaction is attacked.

This ground suffices to dispose of the present appeal, and I have not considered the status of the plaintiff to maintain such an action where it is not shewn that the irregularity can be cured.

The appeal should be dismissed.

LATCHFORD, C.J., and ORDE, J.A., agreed with MASTEN, J.A.

RIDDELL, J.A.:—The main point upon which this appeal depends is whether the lots proposed to be sold are “part of the undertaking” or only “part of the property” of the company. There have been cases, and many more can easily be imagined, in which difficulty could be found in drawing the distinction and in determining to which category, “undertaking” or “property,” the subject-matter of the proposed sale should be considered to belong; but I can find no such difficulty in the present case—in my view, the lots are clearly part of the “property” and not of the “undertaking;” and there is no objection to the directors dealing with them as proposed. It must be unnecessary to discuss the powers of the directors—it is now quite settled that, in the absence of special circumstances, the directors can do anything the company can do: 2 C.E.D. (Ont.) 469 *sqq.*: Masten & Fraser’s Company Law in Canada, 3rd ed. (1929), p. 613 *sqq.*

The appeal should be dismissed.

Appeal dismissed with costs.

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[IN CHAMBERS.]

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May 11.

Criminal Law—Conviction for Rape—New Trial Ordered—Application for Bail pending Second Trial—Delay—Criminal Code, sec. 699.

After conviction of the prisoner for rape and a new trial ordered by a Divisional Court, upon technical grounds, an application to a Judge of a superior court for bail pending the new trial was refused. Rape is an offence punishable with death (sec. 699 of the Criminal Code); and, unless there is unreasonable and unjust delay in bringing on the second trial, bail will not be granted.

McGraw v. The King (1907), 13 Can. Crim. Cas. 337, followed.

THE prisoner, convicted of rape, appealed from his conviction, and the First Divisional Court of the Appellate Division, by a majority judgment, *ante* 181, ordered a new trial.

The prisoner applied for bail.

May 11. The application was heard by HODGINS, J.A., as in Chambers, at a sitting of the Weekly Court in Ottawa.

Gordon Henderson and *R. Mercier*, for the prisoner, pointed out that the new trial could not take place until October, 1929; that the prisoner had been in gaol since the 7th February, 1929; and said that he would undoubtedly appear for trial.

J. A. Ritchie, K.C., for the Crown.

HODGINS, J.A. (at the conclusion of the argument) :—The rule as to bail after conviction is rather stringent—even pending an appeal it is seldom granted.

Counsel in this case have referred to the situation this prisoner is in. Ordinarily the decision with regard to granting bail in a situation such as arises after a conviction is that bail is very seldom given. After a trial and conviction it appears to be more difficult to allow bail. The section of the Criminal Code under which the application is made is sec. 699, where it is provided that only a superior court or judge thereof shall admit to bail a prisoner accused of treason or an offence punishable with death.

Counsel do not seem to realise that the offence of rape is considered by the statute to be as serious as murder.

This case comes before me after the prisoner has been convicted of the offence for which he was tried. He has secured a new trial, but this new trial has been granted on grounds which must be considered as technical grounds.

I used those words advisedly, as in the Quebec case of *McGraw v. The King* (1907), 13 Can. Crim. Cas. 337, the Court of King's

Bench so described irregularities in the composition of the jury and the admission of illegal evidence. In that case, in a court presided over by Taschereau, C.J., and composed of Blanchet, Trenholme, Lavergne, and Cross, JJ., the rule was laid down that the gravity of the offence, the weight of evidence against the prisoner, and the severity of the sentence, are to be taken into consideration in deciding the probability of the prisoner's appearing to take his trial.

It was also there decided that a prisoner convicted and sentenced to death for murder and obtaining a new trial on technical grounds should not be admitted to bail unless there has been an unreasonable and unjust delay on the part of the Crown in bringing on the second trial.

It is true that in this case there will undoubtedly be delay before the prisoner can be tried. The rule is laid down that the prisoner must not be admitted to bail unless there has been unreasonable and unjust delay. Now the sitting for the second trial is to be in October. Therefore there has been no unreasonable or unjust delay in bringing on the new trial. The parties can plead for a speedier trial.

I have no reason to believe there will be unreasonable or unjust delay.

A very heavy sentence of nine years has been meted out to this prisoner. The weight of evidence was entirely against him. No Judge of the Supreme Court said there was no evidence to warrant conviction. The prisoner is a young man, and, being visited by punishment, he might think that starting life somewhere else might be the better thing for him to do.

Following the rule laid down by the Courts of Quebec; and, it being a capital offence or punishable by death, and there being no unreasonable or unjust delay, I am obliged to refuse bail.

Henderson. In the Quebec case it was murder, and the higher court had no other power than to inflict the death-sentence. In this case it was rape and it was not compulsory to inflict the death-sentence.

HODGINS, J.A.—Unfortunately, the statute puts the two offences together. The crime of rape has so far increased that the sentences of prisoners convicted of this offence have been increasing. It has been forced upon the Bench that it is quite time for a substantial increase in the punishment for offences against females. The death-sentence has been pronounced for this offence before this and will be again if circumstances warrant.

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FREEDMAN V. GUARANTY TRUST CO. OF CANADA.

Mechanics' Liens—Claim of Subcontractor—Abandonment of Work by Contractor—Non-completion of Building—Mechanics' Lien Act, R.S.O. 1927, ch. 173, secs. 5, 9, 10—Nothing Owing by Owner to Contractor—Lien Preserved by sec. 12(2)—Effect of sec. 20—Claim for Expense of Financing Completion of Building—Compensation for Delay.

Pursuant to an arrangement between the owners of land and a contractor for building a house thereon, the owners conveyed the land to the contractor and he mortgaged the land to provide funds for building. Upon the completion of the building the contractor was to convey the land back to the owners for a price named. The deed and mortgage were duly registered before the registry of the plaintiff's (subcontractor's) claim for a mechanic's lien. The work proceeded and a substantial part of the building was completed; but, before it was fully completed, the contractor abandoned the contract and absconded:—

Held, that the owners, although they had conveyed the land, had an interest and were still the "owners," within the meaning of the word "owner" as defined in sec. 1 of the Mechanics' Lien Act; by reason of the abandonment nothing ever became due to the contractor; and, by the law of Ontario before the revision of the Act in 1923, the plaintiff had no lien because every lien is limited by secs. 5, 9, and 10 to the amount justly due by the owner to the contractor. But the provisions of secs. 9 and 10 are expressly subject to the limitation "save as herein otherwise provided;" and subsec. 2 of sec. 12, first introduced into the Act in the revision of 1923, has "otherwise provided" and altered the law so as to give the subcontractor an effective lien in the existing circumstances; and he is no longer prevented from enforcing his lien by the circumstances that there is nothing owing by the owner to the contractor.

The owners' claim for money expended in financing for the purpose of completing the building was disallowed; but the owners were allowed something for the damage and loss sustained by them because of their being delayed in obtaining possession of the completed house pursuant to the contract.

Per RIDDELL, J.A. (dissenting):—A substantial part of the work being left unfinished, there never was any money due to the contractor, and the plaintiff could not recover. He was not aided by the provisions of sec. 20 of the Act, for, before he registered his claim, he had full statutory notice of the facts.

AN appeal by the defendants Daniel Bell and Alma Bell from the judgment of the Junior Judge of the County Court of the County of Essex, in a mechanic's lien action, finding that the plaintiff had a lien upon the lands of the appellants.

February 18. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

I. Levinter and N.L. Spencer, for the appellants, argued that there was no right to enforce a lien where one did not exist. Sub-

section 2 of sec. 12 of the Mechanics' Lien Act, R.S.O. 1927, ch. 173, is limited by the provisions of secs. 5, 9, and 10, which in short enact that the amount which can be claimed in respect of any lien shall be limited to the amount owing to the contractor or subcontractor. Where there is nothing owing, there is no right to a lien, as there is nothing upon which the lien can attach and nothing against which a lien can be enforced. There was nothing payable to the contractor in the present case until the house had been completed, and therefore until that time there could be nothing to which a lien could attach, and no fund against which to enforce a lien. Subsection 2 of sec. 12 contemplates a case where a right to a lien exists. It must have been in the contemplation of the parties that, if the contractor should default, the appellants would be entitled to damages to the extent of whatever expense and cost they were put to in completing the building, including the cost of financing, and therefore the defendants should be allowed the sum of \$1,000 claimed as damages, which had been disallowed by the County Court Judge.

H. L. Barnes, for the plaintiff, respondent, submitted that the answer to the appellants' contention that, under the provisions of sec. 9 of the Act, no lien could attach, was to be found in subsec. 2 of sec. 12, which appeared to be intended to cover just such a case as the present. Section 9 states that "save as herein otherwise provided" the lien shall not attach. Subsection 2 of sec. 12 is one of the exceptions contemplated. The respondent has a better position by reason of sec. 20 of the Act. The claim for \$1,000 for financing is too remote; the lienholders are not responsible for any extravagant method of financing which the owner may adopt after the contract has been abandoned.

May 17. *MASTEN, J.A.*—This is an appeal from the judgment of his Honour G. F. Mahon, Junior Judge of the County Court of the County of Essex, dated the 29th September, 1928.

The action is brought to establish a lien under the Mechanics' Lien Act. The plaintiff (respondent), as a subcontractor, claims to be a lienholder and has been so found in the court below. The defendant the Guaranty Trust Company of Canada is the trustee in bankruptcy of the estate of one St. Louis, who is alleged to be the principal contractor. The defendants Daniel Bell and Alma Bell, appellants, are alleged to be (and have been so found below) owners of the property in question within the meaning of the Mechanics' Lien Act. The North American Life Assurance Company is a mortgagee of the property in question.

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The appellants, the Bells, owned a parcel of vacant land on which they desired to have a house erected, and on or about the 5th July, 1927, they entered into a contract with St. Louis to build the house for them according to plans which had theretofore been prepared by their architect. In that agreement they are described as owners and St. Louis as contractor. In order to carry out the wishes of all parties, they also entered into a further agreement with St. Louis, dated on or about the 5th July, 1927, by which the Bells agreed to deed their lands to St. Louis for \$1; St. Louis agreed to raise a mortgage on the lands so as to provide funds for building the house as contracted. The agreement further provided that on completion of the house St. Louis would sell the lands and the completed house to the Bells for \$7,000, plus any extras that might have been ordered, and the Bells on their part agreed to buy back the lands and house on these terms. Nothing became due or payable by the Bells to St. Louis till the house was completed.

By deed dated the 6th July, registered on the 11th July, the Bells conveyed to St. Louis the lands in question, pursuant to the agreement above mentioned. On the 16th July, St. Louis made a mortgage to the North American Life Assurance Company for \$5,000, which mortgage was duly registered on the 18th July, 1927.

Under these circumstances the Bells had an interest in the property in question, and the house was to be built by St. Louis with the privity and consent of the Bells and for their direct benefit. Hence it is plain that the Bells were owners within the meaning of the term "owner" as defined in sec. 1 of the Mechanics' Lien Act. See also *Reggin v. Manes* (1892), 22 O.R. 443, at p. 445.

The respondent is a subcontractor under St. Louis, having supplied labour and material at his request.

The work proceeded and a substantial portion of the building was completed.

Before the building was fully completed, St. Louis abandoned the contract and absconded. In consequence nothing has ever become due from the Bells to St. Louis: *Appleby v. Myers* (1867), L.R. 2 C.P. 651; and see the third exception laid down in *H. Dakin & Co. Ltd. v. Lee*, [1916] 1 K.B. 566, at p. 574.

The Bells claim that the respondent, as a subcontractor under St. Louis, has no lien because every lien is limited by secs. 5, 9, and 10 to the amount justly due by the owner to the contractor, the subcontractor being only subrogated to the rights of the primary contractor.

This was unquestionably the law of Ontario down to the time when the Act was revised in 1923. See the cases of *Farrell v. Gallagher* (1911), 23 O.L.R. 130; *McManus v. Rothschild* (1911), 25 O.L.R. 138; *Burton v. Hookwith* (1919), 45 O.L.R. 348.

The real question to be considered by this Court is, whether subsec. 2 of sec. 12, which was first introduced into the Act at the revision of 1923, has altered the law so as to give to the subcontractor an effective lien in the circumstances here existing.

Subsection 2 of sec. 12 reads as follows:—

“Every subcontractor shall be entitled to enforce his lien notwithstanding the non-completion or abandonment of the contract by any contractor or subcontractor under whom he claims.”

This enactment appears to me to carry with it two implications: first, that the subcontractor has a lien by virtue of doing his work or supplying materials; and, second, that non-completion and abandonment as obstacles in the way of enforcement of the subcontractor's lien are abolished, and with them necessarily disappear as against the subcontractor's lien the subsidiary concomitants and incidents of non-completion, one of which is that nothing had become due from the owner to the principal contractor. Hence the result of the new statutory provision is that the subcontractor is no longer prevented from enforcing his lien by the circumstance that there is nothing owing by the owner to the principal contractor. In other words, he is by this clause of the statute placed in the same position with regard to enforcement of his lien as though the work as it stood at the date of abandonment was *pro tanto* a legal fulfilment of the contract and as if the principal contractor was entitled to recover against the owner on a *quantum meruit* for the value of the work so far as completed.

The legal obstacle created by the principle of *Appleby v. Myers*, L.R. 2 C.P. 651, is abrogated in so far as it prevents the enforcement of a subcontractor's lien.

This appears to me to be the proper construction of subsec. 2 of sec. 12, and the result which necessarily flows from it.

I shall refer later to the question of the subject-matter or fund to which the enforcement of the lien is limited.

While the proper construction of the words of subsec. 2 is primarily to be considered, other considerations, to which I shall now advert, yield corroborative support to the construction which I have indicated.

The limitations prescribed by secs. 5, 9, and 10 of the Act are expressly made *subject to the specific provisions elsewhere found in the Act.*

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By sec. 5 any person, whether contractor or subcontractor, who performs any work or furnishes any materials shall by virtue thereof have a lien upon the estate or interest of the owner in the property on which the work was done or to which the materials were supplied. He does not acquire a lien on a fund but a lien on the physical property, and this lien arises by the doing of the work or the furnishing of the material.

While a lien exists as soon as the work is done or the material supplied, the amount for which it can be enforced is, by sec. 5, subject to two limitations: (a) it is limited to the sum justly due to the person entitled to the lien; (b) it is limited to the sum "justly owing, *except as herein provided*, by the owner."

These two limitations are repeated and amplified by secs. 9 and 10 of the Act, which read as follows:—

"9. Save as herein otherwise provided the lien shall not attach so as to make the owner liable for a greater sum than the sum payable by the owner to the contractor.

"10. Save as herein otherwise provided where the lien is claimed by any person other than the contractor the amount which may be claimed in respect thereof shall be limited to the amount owing to the contractor or subcontractor or other person for whom the work or service has been done or the materials placed or furnished."

But it is to be observed that each of the above sections begins with the words "save as herein otherwise provided," and, by sec. 12, subsec. 2, it is otherwise provided, as it seems to me.

Again it is important in this connection to observe the state of the law prior to the passing of subsec. 2 of sec. 12. As I understand the law to have existed, it is that if at the time when the contractor abandoned the work there was an amount due to him by the owner, the lien of the subcontractor would, without the aid of subsec. 2, be enforceable to the extent of the balance so due from the owner to the contractor.

If the amendment in question is to be interpreted as applying only to cases where there is a balance actually payable by the owner to the contractor at the date of the abandonment, it is entirely nugatory and was unnecessary and valueless, for without subsec. 2 the subcontractor's lien was an effective charge on whatever amount had become due and owing from the owner to the contractor at the moment of abandonment. It is reasonable to assume that the Legislature meant to accomplish some purpose when it added subsec. 2 to the Act. But, if any effect is to be given to the amendment, it can only be by making the subcontractor's lien enforceable

notwithstanding the fact that nothing is payable by the owner to the contractor in consequence of the contract being abandoned.

Further, in his reasons for judgment the learned Judge determines the value of the work which had been completed at the date of abandonment at the sum of \$3,270. This he arrives at by deducting from \$7,070 (the sum which the Bells were to pay for the completed work) the sum of \$3,800, which on the evidence he finds to be the amount necessary to complete the building.

From this \$3,270 he then deducts the sum of \$1,608.10, being the amount found due to the mortgagees the North American Life Assurance Company for their prior claim, leaving the sum of \$1,661.90 for distribution *pro rata* among the lienholders, whose total claims aggregate \$3,671.93, as shewn by the 4th schedule of the report.

If these findings of fact are correct, and if the liens of the subcontractors are disallowed, the owners absorb this sum of \$1,661.90 without paying anything for it, and the subcontractors who supplied the material and labour which created the building get nothing except a valueless judgment against the principal contractor.

If to this state of facts there is applied the test laid down in *Heydon's Case* (1584), 2 Co. Rep. 18, it appears that, before the passing of the clause in question, subcontractors, in the circumstances here existing, lost the benefit of a lien for the material and labour supplied by them, while the owner got the benefit of the same without paying for it.

It would then appear that the Legislature enacted the clause in question to cure this difficulty, and that the true reason for the amendment of the Act was to give to such subcontractors a lien on that which theretofore had inequitably gone to the owner. In *Heydon's Case* it was further held that it is the duty of the Court to make such construction of the statute as shall suppress the mischief and advance the remedy.

The general purpose of our Mechanics' Lien Act being to protect the claims of those who supply work and materials so long as the owner is not prejudiced, I am of opinion that, on this further ground, subsec. 2 of sec. 12 is to be construed in the manner which I have already indicated.

As it seems to me, the effect of the statute is to remove the technical and legal obstacle in the way of the subcontractors and allow the subcontractors' liens as a claim on the property as it stood at the date of abandonment, and thus accomplish a just and equitable result. For why should the owner in a case like the present, without paying anything, gain the benefit of the subcon-

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1929. This view, namely, that such action on the part of the contractor, will not defeat the subcontractors' right, has been maintained in many of the American courts, and the cases are collected in notes 8 and 9 to para. 64, p. 160, of Rockel on Mechanics' Liens, and the subcontractor is held entitled to a lien for the reasonable value of his materials and work after deducting any claims or damages for non-performance of the contract by the principal contractor.

For these reasons, I am of opinion that the court below was right in maintaining the plaintiff's lien.

As to the appellants' claim that the sum allowed for cost of completion should be increased: this is a question of fact, where conflicting evidence was heard at length before the trial Judge, and we ought not to interfere.

The claim for \$1,000 by the Bells for financing so as to complete the building was, I think, properly disallowed.

Some allowance ought, I think, to be made to the appellants for the damage and loss sustained by them in consequence of their being prevented and delayed from occupying the completed house pursuant to the contract; and, if the appellants so desire, there should be a reference back to ascertain what sum should be allowed on this account.

Success being divided, there should be no costs of this appeal.

LATCHFORD, C.J., and ORDE and FISHER, JJ.A., agreed with MASTEN, J.A.

RIDDELL, J.A. (dissenting):—The defendants the Bells, husband and wife, being owners of a certain lot, and being desirous of having a house built thereon, entered into an agreement with one St. Louis, a contractor—the contract being of a character now not very uncommon, and not unlike to that we considered in *Lester v. MacMaster* (1925), 28 O.W.N. 307; in this contract, the Bells were to convey the land to St. Louis, he to raise money on a mortgage to finance the building, and to erect a house on certain plans and specifications; at the completion of this building, the Bells were to buy the property at a price named and assume the mortgage. Of course, this was rather a roundabout way of placing the builder in a safe position but holding as trustee.

St. Louis went on with the building and procured work and materials to a considerable extent; this before the registration of the deed from the Bells to St. Louis. This is the basis for this

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mechanics' lien action. It, however, seems clear that the present plaintiff was well aware of the fact of the arrangement, and knew that St. Louis was building for the Bells. St. Louis effected a mortgage, and it became necessary for a deed to him to be registered; thereafter the claims for lien were registered. At the trial, the learned County Court Judge held that the land was subject to mechanics' liens, and gave judgment accordingly. The Bells, the real owners of the land, now appeal.

Following a uniform set of decisions, of which *Taylor v. Caldwell* (1963), 3 B. & S. 826, is the most familiar, we decided in *Lester v. MacMaster*, 28 O.W.N. 307, that where there is a contract to do a complete work for a stated sum, nothing is due unless and until the work is completed; and the rule of *quantum meruit* does not apply. Of course, trifling or unimportant defects may not be fatal—*de minimis non curat lex*.

In the present case a very substantial part of the work was left unfinished, and there never was any money due the contractor St. Louis—and, unless there is more in the case, the lienor cannot recover: R.S.O. 1927, ch. 173, sec. 9.

It was argued on the part of the respondent that he was given a better position by the provisions of sec. 20 of the Act; and, were the facts different, there might be something in the contention. The statute, after providing for registration of the claim for lien, goes on in sec. 20 to say:—

“20. Where a claim is so registered the person entitled to a lien shall be deemed a purchaser *pro tanto* and within the provisions of the Registry Act and the Land Titles Act, but except as herein otherwise provided those Acts shall not apply to any lien arising under this Act.”

The argument is that, the deed to St. Louis appearing in the registry, the lienor is entitled to look to him as the real owner, and consequently the lien should attach independently of an equity in the Bells. The difficulty in his way is that, before he registered his claim, the agreement between the Bells and St. Louis had been registered, and consequently he had, at the moment when for the first time he could take advantage of this section, full statutory notice of the facts—this is, of course, quite independent of the difficulty arising from his apparent actual knowledge of the arrangement, and of that arising from his pleadings, which are wholly based upon the assumption that the Bells were the owners and St. Louis, their contractor.

I would allow the appeal with costs throughout.

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Judgment as stated by MASTEN, J.A.

[APPELLATE DIVISION.]

1929.

RUTTAN v. O'CONNOR-FENTON.

May 17.

Negligence—Motor-vehicle upon Village Highway—Injury to Pedestrian—Excessive Speed—Contributory Negligence—Finding of Trial Judge—Both Parties Negligent—Apportionment of Damages—Evidence—Appeal—“Clear View”—Absence of, Caused by Darkness.

The plaintiff, a pedestrian, crossing a highway in a village, at night, was struck by a car driven by the defendant and injured. At the trial without a jury of an action for damages for the plaintiff's injuries, the trial Judge found that both parties were guilty of negligence, and apportioned the damages:—

Held, upon the defendant's appeal (MASTEN and FISHER, J.J.A., doubting), that upon the evidence the decision of the trial Judge could not be reversed.

Per LATCHFORD, C.J. and RIDDELL, J.A.:—The defendant's head-light did not give him the “clear view,” when rounding a curve from one street to another, referred to in sec. 23 of the Highway Traffic Act; and he should not have proceeded at a rate of speed greater than 10 miles per hour in a village. The absence of a “clear view” may be caused as effectually by the absence of sufficient light as by the intervention of a physical obstruction.

AN appeal by the defendants from the judgment of ROSE, J., at the trial (11th October, 1928), in favour of the plaintiff for the recovery of \$1,350 and costs in an action, tried without a jury, for damages for injury sustained by Nannie F. Ruttan, the plaintiff, while walking upon a highway in the village of Norwood, by reason of the negligence of the defendant Nigel O'Connor-Fenton in operating a motor-vehicle owned by his mother, the defendant Annie Sophia O'Connor-Fenton.

April 15 and 16. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

R. H. Greer, K.C., for the appellants, argued that the injuries which the plaintiff suffered were wholly the result of her own negligence, and were not caused by the negligence of the defendant Nigel O'Connor-Fenton: *Neenan v. Hosford*, [1920] 2 I.R. 258; *Robinson v. Toronto Transportation Commission* (1923-4), 24 O.W.N. 558, 25 O.W.N. 113, 27 O.W.N. 101.

F. D. Kerr, K.C., for the plaintiff, respondent, contended that the appellant Nigel had not the “clear view,” when rounding the curve in the road, which is required by sec. 23 of the Highway Traffic Act, R.S.O. 1927, ch. 251, and so he rounded the curve at such a rate of speed that he could not safeguard any one who might happen to be in his path. He was therefore guilty of the negligence which was the proximate cause of the accident: *Macandrew v. Tillard*, [1909] Sess. Cas. 78; *Walker v. Martin* (1919), 46 O.L.R. 144; *Luck v. Toronto Railway Co.* (1920), 48 O.L.R. 581.

May 17. LATCHFORD, C.J.:—This appeal, in my opinion, fails and should be dismissed with costs.

While the plaintiff by her negligence contributed to the accident, and the damages found have been diminished in accordance with the Contributory Negligence Act, R.S.O. 1927, ch. 103, the cause of the accident was the excessive speed of Mr. O'Connor-Fenton when his head-light did not give him the "clear view," when rounding the curve from the Dummer-road to Victoria-street, that is required by sec. 23 of the Highway Traffic Act, R.S.O. 1927, ch. 251. He knew that in a village like Norwood, where he had long resided, and where sidewalks were few or non-existent, it was customary for the people to walk in the road, as the plaintiff was walking on the night of the accident.

I may add that I think the crowding of three persons into the narrow front seat of a five-passenger car—one a young lady riding bodkin between two gentlemen—can hardly be regarded as conducive to the observance of the care that the driver of a motor-vehicle is called upon to exercise.

RIDDELL, J.A.:—In this appeal from the judgment at the trial without a jury by my learned brother Rose, I can find no error of fact or law; and would dismiss the appeal with costs. There is nothing of fact and only one point of law, at all novel, or, in my view, requiring discussion—with one exception, everything in the law is trite and has been before us many times, while the facts are not recondite or complicated, but plain.

The one exception to which I have referred is a matter of law, which seems to be of first instance. The statute, R.S.O. 1927, ch. 251, by sec. 23 provides that where at an intersection, etc., "the driver of the vehicle" (i.e., a motor vehicle) "has not a clear view of any approaching traffic" he must not proceed "at a greater rate of speed than 10 miles per hour in a city, town or village . . ." There was in the present case no physical obstruction preventing a "clear view," but it was dark and there was not sufficient light to enable the driver to see clearly what might be approaching; it is argued that the statute covers such a case, the absence of "a clear view" being caused as effectually by the absence of sufficient light as by the intervention of a physical obstruction. I am of opinion that this is the correct interpretation of the statute, which is intended for the safety of the public—just as much care should be taken when the driver cannot see what is approaching by reason of insufficient light as if the cause is some building; in either case there is not a clear view.

And the statute is, I think, more comprehensive; bearing in

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mind its object, just stated, I can see no reason for not taking the literal meaning of the words employed; the language is not "where a clear view . . . cannot be had," but "where the driver of the vehicle has not a clear view . . . ;" and a driver of a vehicle might not have a clear view though there was no physical obstruction, and there was an atmosphere clear of fog or murkiness at an intersection, fully lighted—the driver might not have a clear view because he was nyctalopic, purblind, short-sighted, drugged, drunk, or inattentive—it requires no great stretch of the imagination or extensive knowledge of human nature to lead one to suspect that the last adjective correctly expresses the condition of the driver in the present instance.

MASTEN, J.A.:—In this appeal I share the doubts which were felt by the trial Judge and which are well expressed, with the grounds therefor, in the reasons of my brother Fisher; but, after the best consideration I have been able to give to the whole evidence, I find myself unable to justify a dissent from the unanimous opinion of my brethren supporting the conclusion reached by the trial Judge.

ORDE, J.A.:—I agree that this appeal should be dismissed. No ground has been shewn for disturbing the finding of the learned trial Judge that the defendant was guilty of negligence. Drivers of motor-cars ought to realise that to turn from one village street into another during the night, at even so low a speed as 12 miles per hour, may endanger pedestrians lawfully upon the highway, and that failure to have their cars under sufficient control to avoid collision will constitute negligence, with the consequent liability for the damages thereby caused.

FISHER, J.A.:—The sole question on this appeal is whether or not the defendant was guilty of any negligence. The trial Judge found that the defendant O'Connor-Fenton, and McConnell, one of the occupants of the car, gave accurate statements of the facts. Both these witnesses agree that the speed of the car when turning into Wellington-street was about 12 to 15 miles per hour, and that when the turn was completed the plaintiff was in the highway distant from the defendant's car about 6 or 8 feet; that the defendant immediately applied the foot-brake, grasped the emergency with his right hand (according to the evidence the brakes were in a most efficient condition), and did everything humanly speaking to avoid the accident, and at the time of the impact the speed of the car had been reduced to about 2 or 3 miles per hour.

The trial Judge also found that the plaintiff was paying no attention whatever to any approaching traffic and that her mind was wholly taken up with thinking about writing a letter to an absent son in the far West.

No one questions that it is the duty of the driver of an automobile, not having a clear view in turning a corner and intending to proceed thereafter, to proceed with care and also to have his car under control.

This is not a case of a driver approaching a crossing and there seeing a pedestrian contemplating crossing or likely to cross, but that of a pedestrian crossing a street in a village where the traffic is slight at a point some distance east of the regular crossing, and suddenly thrusting herself in the path of a car without the slightest warning of any kind and giving no chance whatever to the driver of the car to avoid the accident. I find it difficult to believe that the defendant in these circumstances should be held to be guilty of actionable negligence. It might just as well be argued that if the plaintiff had been 3 feet from the car when the turn was made, instead of 6 or 8 feet, the defendant was guilty of negligence because he did not, as he could not, have stopped in time to avoid an accident. I am inclined to think that the sole and proximate cause of the accident was the plaintiff suddenly thrusting herself in front of the car at an unexpected place, thereby creating a crisis, so to speak, and giving the defendant no chance whatever to avoid hitting her. But, as there was a fair trial before a careful and experienced Judge who had all the witnesses under observation, and who was of the opinion that both the plaintiff and defendant were equally guilty of negligence, and the majority of this Court being of that opinion, with much doubt I agree that this appeal must be dismissed.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

BETTLES v. CANADIAN NATIONAL RAILWAY Co.

1929.

May 17.

Negligence—Infant Injured on Premises of Railway Company—Trespasser.

The judgment of JEFFREY, J. (1929), 63 O.L.R. 537, as regards the infant plaintiff, was reversed.

Held, that the infant plaintiff was not an invitee or a licensee, but a mere trespasser, and could not recover.

Addie Ltd. v. Dumbreck (1929), 45 Times L.R. 267, followed.

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AN appeal by the defendants from the judgment of JEFFREY, J. (1929), 63 O.L.R. 537, in so far as it awarded damages for the injury sustained by the infant plaintiff.

April, 18. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

D. L. McCarthy, K.C., and *R. E. Laidlaw*, for the appellants, argued that the infant plaintiff, Betty Bettles, was a trespasser on the appellants' property, and it could not be contended that they had been guilty of any breach of that slight duty which one owes to a trespasser. They were not guilty of any active negligence. The learned trial Judge erred in considering the infant plaintiff a licensee. The law governing the case is properly laid down in *Addie Ltd. v. Dumbreck* (1929), 45 Times L.R. 267, at p. 270. No duty is owed to a trespasser except not to injure him maliciously.

C. E. Putman, for the infant plaintiff, respondent, contended that the infant plaintiff was a licensee, as found by the learned trial Judge, and not a trespasser, and that the case was governed by *Burchell v. Hickisson* (1880), 50 L.J. Q.B. 101.

May 17. LATCHFORD, C.J.:—This appeal is against the judgment of Mr. Justice Jeffrey of the 1st March, 1929, so far as it awards damages for the injuries sustained by the infant plaintiff, Betty Bettles.

The liability of the defendants depends wholly on whether there was, on their part, in the circumstances, any breach of their duty toward the child whom they injured.

Betty's father was rightfully on the railway property, though not in my opinion as an invitee. His own evidence establishes that the trial Judge erred in stating that he was there at the request of an employee of the railway company. Bettles swore that he was there at the request of one of his own employers. "I had," he said, "a 'phone call on July 7th to go down to the dining-car department and pick up bottles." His counsel then asked:—

"Where did the 'phone call come from? A. City Dairy."

There was no other request, express or implied. Bettles was not an invitee, but merely, at most, a licensee, of the defendants.

Whatever his position, his little daughter was, in my opinion, not even a licensee. Possibly, had she been brought on the railway premises to assist him in the work he was permitted to do there for his employers, she might properly be classed within the same category as her father.

But she was not brought on the property of the defendants for any purpose connected with her father's business there.

Bettles was asked: "How did Betty happen to go with you?" He answered: "Mrs. Bettles was not feeling very well and I thought if I would take her out the mother might go back to bed two or three hours."

On cross-examination:—

"Q. Can you tell me anything up to the time you took Betty on the property that morning which you thought entitled you to take her there? A. It never entered my head."

"Q. Can you suggest anything which you thought gave you a right to take Betty on the railway property that morning? A. No, certainly not."

"Q. So far as your relations with the railway company were concerned that morning, you were taking Betty on the railway property that morning without any licence or permission to take her, and without anything you knew about to give you the right to do so? A. Yes."

Accordingly I think the learned trial Judge erred when he came to the conclusion that the child was a licensee, and therefore not a trespasser. Not only is there nothing in evidence upon which a licence, express or implied, can be based, but the testimony of the father establishes that Betty was on the railway property neither as invitee nor as licensee.

There is only one other category into which a person visiting the premises of another may fall—that of trespasser—and Betty in the circumstances ranked no higher. The law applicable is elaborately reviewed and clearly stated in a judgment of the House of Lords delivered in March of the present year, *Addie Ltd. v. Dumbreck*, 45 Times L.R. 267.

Upon the principles there laid down, Betty was not entitled, in the circumstances of this case, to recover damages from the defendants, whose appeal must be allowed with costs if demanded.

RIDDELL, J.A.:—The facts of this case are clearly set out in the learned Judge's reasons for judgment, and need not be repeated. I find myself wholly unable, sympathetic as one must be with the infant plaintiff, to appreciate the supposed distinction between the present and the very recent case in the House of Lords (which I have discussed in a different connection) of *Addie Ltd. v. Dumbreck*, 45 Times L.R. 267.

In their latest decision on the subject, the Lords of the Judicial Committee have laid down the rule that in a case governed by English law, as this is, we are conclusively bound by a decision of the House of Lords. Consequently, we must here follow the *Addie* case. If anything different and inconsistent with the *Addie*

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case was decided by a Divisional Court in *Burchell v. Hickisson*, 50 L.J.Q.B. 101, and I think there was not, then it is overruled and not law.

The difference between such a case as this and that of a child going with a parent—or without—to meet or see off a relative on the train at the station must be obvious; it is the regular and recognised custom for such things to be done, and the railway companies know it. No one would imagine that the railway companies could know, or, if they knew, could permit, such a custom in a case like the present, and it is not pretended that such a custom does exist.

Being bound by authority to hold that there is no liability in such a case, I would allow the appeal and dismiss the action, both with costs.

MASTEN, J.A.:—The appeal in this case is covered, in my opinion, by the decision of the House of Lords in the recent case of *Addie v. Dumbreck*, reported in 45 Times L.R. 267. In that case the Lord Chancellor says (p. 268) :—

“The first and, in my opinion, the only question which arises for determination is the capacity in which the deceased child was in the field and at the wheel on the occasion of the accident. There are three categories into which persons visiting premises belonging to another person may fall: they may go: 1. by the invitation, express or implied, of the occupier; 2. with the leave and licence of the occupier; and 3. as trespassers. It was suggested in argument that there was a fourth category of persons who were not on the premises with the leave or licence of the occupier, but who were not pure trespassers. I cannot find any foundation for this suggestion either in English or in Scotch law, and I do not think that the category exists.”

And, at p. 270, Lord Dunedin says:—

“Now the line that separates each of these three classes is an absolutely rigid line. There is no half-way house, no no-man’s land between adjacent territories.”

Now in the present case it is plain that the unfortunate child who suffered from this accident did not go upon the land of the defendant railway by any invitation or with the leave and licence of the railway company, express or implied. That being so, her presence could only be as a trespasser, and toward a trespasser an occupier is in such case liable only where the injury is due to some wilful act involving something more than an absence of reasonable care. It must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless

disregard of the presence of the trespasser. The act of the railway company in the present case involved no such element; and therefore, in my opinion, the appeal in this case must be allowed and the action dismissed.

I should add that our decision in the present case should be confined strictly to the circumstances here existing, for, as was said by Lord Dunedin in the *Addie* case, above cited (p. 270), "When you come to the facts, it may well be that there is great difficulty—such difficulty as may give rise to difference of judicial opinion—in deciding into which category a particular case falls, but a judge must decide, and, when he has decided, then the law of that category will rule and there must be no looking to the law of the adjoining category." The decision in the present case relates solely to the category of a trespasser and has no application to the other two categories above mentioned.

ORDE, J.A., reluctantly agreed.

FISHER, J.A., also agreed.

Appeal allowed.

[APPELLATE DIVISION.]

RE JACKSON.

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May 17.

Limitation of Actions—Claim upon Promissory Note against Estate of Deceased Person—Bar by Lapse of Statutory Period—Evidence of Claimant as to Payments of Interest—Lack of Corroboration—Evidence Act, sec. 11—Appeal from Order of Surrogate Court Judge Allowing Claim—Forum—Surrogate Courts Act, sec. 28.

An order of the Judge of a Surrogate Court allowing, against the estate of a deceased person, a claim upon a promissory note made by the deceased, was reversed upon the ground that the evidence of the claimant as to payments of interest having been made, which would prevent the claim being barred by the Limitations Act, was not corroborated: Evidence Act, R.S.O. 1927, ch. 107, sec. 11.

A Divisional Court of the Appellate Division is not, upon the true construction of sec. 28 of the Surrogate Courts Act, R.S.O. 1927, ch. 94, the proper forum for the hearing of such an appeal.

History of the legislation.

Nevertheless, the appeal being brought before a Divisional Court, one of the Judges of that Court, in his capacity of an *ex officio* Judge of the High Court Division, made an order allowing the appeal.

An appeal by the executor of Edward Jackson, deceased, from an order of one of the Judges of the Surrogate Court of the County of York allowing against the estate of Jackson a claim of the executor of John Wesley Palmer upon a promissory note for \$400 made by Jackson.

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App. Div. April 29. The appeal came on for hearing before LATCHFORD,
1929. C.J., RIDDELL, MASTEN, and ORDE, JJ.A.

RE JACKSON. *F. G. Cook*, for the respondents, by way of preliminary objection, questioned the jurisdiction of the Court to hear the appeal, owing to the provisions of the Surrogate Courts Act, R.S.O. 1927, ch. 94, sec. 28. He contended that the appeal must be to a single Judge.

D. P. J. Kelly, for the appellant, submitted that under the provisions of sec. 28, the appeal could be heard by a Divisional Court. He referred to *Re Reid* (1921), 50 O.L.R. 595. On the merits, he argued that the Limitations Act was a complete bar to the action. Furthermore, the evidence adduced as to payment of interest was that of an "interested party," and, not being corroborated, the claimant could not "obtain a verdict:" Evidence Act, R.S.O. 1927, ch. 107, sec. 11.*

Cook, in answer to the appeal on the merits, contended that upon the evidence the case was taken out of the Limitations Act by payments of interest.

May 17. RIDDELL, J.A.:—Among the papers of the late John Palmer was found, by his executors, a promissory note dated April, 1900, undoubtedly made by Edward Jackson, who died on the 8th May, Palmer having died in April. A claim having been made upon this note against the estate of Edward Jackson, the matter was tried before his Honour Judge Tytler, one of the Judges of the Surrogate Court of the County of York; he gave judgment for the claimant; and the executor of Edward Jackson appeals to this Court. On a preliminary objection being taken, we decided to hear the appeal subject to the objection.

On the merits, there can be no doubt that the judgment appealed from is wrong. The note is undisputed, its non-payment is undisputed; but the Statute of Limitations is raised and is a perfect defence, unless something can be proved which takes the case out of the statute. What is alleged is the payment of interest within the six years; this is attempted to be proved by the evidence of the claimant only; and, even assuming that this evidence would otherwise be sufficient (which may be doubtful, and I decide nothing in that regard), the law is imperative that the claimant cannot "obtain a verdict, judgment, or decision, on his own evidence. . . .

* 11. In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment, or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other material evidence.

. . . unless such evidence is corroborated by some other material evidence." Evidence Act, R.S.O. 1927, ch. 107, sec. 11. The only material evidence is evidence bearing upon the payment of interest, and corroboration in that respect is wholly wanting. The refusal to give judgment for the claimant in such a case does not, in the least, imply that the evidence of the claimant is not to be believed; but only that it is not to be given effect to. In more than one such case I thoroughly accredited a witness — and said so — but was unable, by reason of the imperative language of the statute, to grant judgment based upon this evidence. Our Legislature has seen fit to make that a rule of law which had been in England a rule of practice in some Courts; but we must obey the statute, without question.

The objection to our jurisdiction is based upon the Surrogate Courts Act, R.S.O. 1927, ch. 94, sec. 28, which reads:—

"28.—(1) Any party may appeal to the Divisional Court from an order, determination or judgment of a surrogate court, in any matter or cause when the value of the property affected by such order, determination or judgment exceeds \$200.

"(2) A motion for a new trial after a trial by jury shall be deemed an appeal.

"(3) An appeal shall also lie to a judge of the Supreme Court from any order, decision or determination of the judge of a surrogate court, on the taking of accounts or upon an adjudication as to claim or demand or as to the title to any property if the amount involved exceeds \$200 in like manner as from the report of a Master under a reference directed by the Supreme Court."

The decision must depend upon the application of the conjunction "also" in subsec. (3). Is the meaning, "There being a provision in the previous subsection (1) for an appeal to the Divisional Court in the following cases, there is also another court to which the appeal may be taken instead of the Divisional Court?" Or is the meaning, "There being a provision for an appeal to the Divisional Court in certain cases mentioned in subsec. (1), there is another class of cases in which an appeal may be taken, and such appeal is to be to a Judge of the Supreme Court."

The answer is to be sought in the history of the legislation, it being well understood that the present Act is in general a consolidation and systemisation of previous legislation.

It will not be necessary to go further back than 1909. By the then existing legislation, the Trustee Act, R.S.O. 1897, ch. 129, sec. 35, an executor or administrator was authorised to serve notice disputing any claim made against the estate; and the claimant must bring action within six months or be barred. There

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was no special provision for the method of bringing this action, and it was brought in the same way as any other action—the strictness with which the statute was interpreted may be seen in the case of *Gooderham v. Moore* (1899), 31 O.R. 86. In 1909, the Act 9 Edw. VII. ch. 32, by sec. 1 added to the existing Surrogate Courts Act, R.S.O. 1897, ch. 59, a new section 18a., which gave to the Judge of the Surrogate Court the power to try such claims—the adjudication to be filed in the County Court and become a judgment of that Court. This legislation was repeated on the revision and consolidation of Surrogate Court legislation in 1910, by 10 Edw. VII. ch. 31: see sec. 69. So far, there was no direction as to appeals from such adjudications; but in 1911 the Act 1 Geo. V. ch. 18 added to the existing 10 Edw. VII. ch. 31, sec. 34, a new provision. The existing section gave an appeal to any person "who deems himself aggrieved by an order, determination or judgment of a Surrogate Court;" but that was not considered to cover the case of an adjudication upon a disputed claim by the Surrogate Court Judge, the power to determine such matters having been given in 1909; accordingly, the new Act of 1911, 1 Geo. V. ch. 18, sec. 2, added a provision which was to be sec. 34 (5):—

"(5) An appeal shall also lie from any order, decision or determination of the Judge of a Surrogate Court on the taking of accounts in like manner as from the report of a Master under a reference directed by the High Court, and the practice and procedure upon and in relation to the appeal shall be the same as upon an appeal from such a report."

This kind of appeal was to be quite distinct from the appeals already given and was not to be under the same rules, subsec. 6 reading:—

"(6) Subsections 2 and 3 shall not apply to the appeal provided for by subsection 5."

That this is the kind of appeal appears also from sec. 3 of the Act of 1911, enacting a new sec. 69, of which see subsec. 10.

Then came the revision of 1914—the R.S.O. 1914, ch. 62, sec. 34, gives no new law, but simply consolidates that already in force—the same may be said of our present Revised Statute.

It seems quite clear from the history of the legislation that the kind of appeal now before us should go to a single Judge; and that has been the constant practice.

Strictly we should dismiss this appeal, with costs as of a motion to quash, but that would mean needless expense with benefit to neither party; it seems to me that the ends of justice will be met by considering this as a motion before one of us sitting

alone, and allowing the appeal in that way. There should be no costs—the appellant is right in law in his contention; but he has come into the wrong forum, and it is only as an indulgence that we can grant him any relief.

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MASTEN and ORDE, JJ.A., agreed.

LATCHFORD, C.J.:—On the merits this appeal must succeed. The only evidence of any payment of interest on this 28-year old note is that of the executor, John Wesley Palmer, an “interested party.” As it is uncorroborated, it does not prove such payment: Evidence Act, R.S.O. 1927, ch. 107, sec. 11.

A preliminary objection to the appeal is that, as it is from the decision of a Judge, it should have been taken to a Judge in Weekly Court. To give effect to that contention—though I think it well-founded—would be to have further costs incurred to no purpose. I shall treat the appeal as made to me as a Judge of the Supreme Court and allow it, though in the circumstances without costs.

The claim should be dismissed, and the appellant have his costs of resisting the claim before the Surrogate Court Judge.

Order accordingly.

[WRIGHT, J.]

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May 29.

Limitation of Actions—Damages by Motor-vehicle—Highway Traffic Act, R.S.O. 1927, ch. 251, sec. 53(1)—“Six Months from the Time”—Computation.

An action for the recovery of damages occasioned by a motor-vehicle on the 8th September, 1928, was begun by writ issued on the 8th March, 1929:—

Held, that it was not barred by sec. 53(1) of the Highway Traffic Act. Where anything is to be done in a certain time after a given event or date, the day of the occurrence is to be excluded.

McCann v. Martin (1907), 15 O.L.R. 193, applied and followed.

ACTION to recover damages for injuries sustained by the plaintiff in an automobile accident.

The action was tried before WRIGHT, J., without a jury, at a Toronto sittings.

W. D. M. Shorey, for the plaintiff.

T. L. Monahan, K.C., for the defendant.

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May 29. WRIGHT, J.:—Various defences were set up, and at the trial an application was made by the defendant for leave to amend his statement of defence by adding a clause setting up the provisions of subsec. 1 of sec. 53 of the Highway Traffic Act, R.S.O. 1927, ch. 251.

I reserved judgment on the motion, and also my decision as to whether, even if the statute were allowed to be pleaded, it would constitute a defence under the circumstances. The trial proceeded and the jury found for the plaintiff. It is now necessary to decide the matters reserved.

I think, under all the circumstances, the motion to amend should be allowed, as it raised a question of law only and could not prejudice the plaintiff at the trial.

A consideration of the authorities, however, has convinced me that the statute does not constitute a defence. The accident happened on the 8th September, 1928, and the writ was issued on the 8th March, 1929.

Subsection 1 of sec. 53 of the Highway Traffic Act reads as follows:—

“Subject to the provisions of subsections 2 and 3 no action shall be brought against a person for the recovery of damages occasioned by a motor-vehicle after the expiration of six months from the time when the damages were sustained.”

The authorities appear to be quite clear that, where anything is to be done in a certain time after a given event or date, the day of the occurrence is to be excluded. See Halsbury’s Laws of England, vol. 27, paras. 888, 889; see also *Hanns v. Johnston* (1883), 3 O.R. 100; *Goldsmiths’ Co. v. West Metropolitan Railway Co.*, [1904] 1 K.B. 1; see also *Mc Cann v. Martin* (1907), 15 O.L.R. 193.

In the case last cited the phraseology of the statute is very nearly like that of the statute under review. The statute considered in that case was the Bills of Sale and Chattel Mortgage Act, which, among other things, enacted that “Every mortgage . . . shall cease to be valid, as against the creditors . . . after the expiration of one year from the date of the filing thereof, unless,” etc.

In that case it was pointed out by Mr. Justice Anglin, at p. 194, that the wording was “from the day,” and that this necessarily excluded the day upon which the act took place.

I therefore hold that the statute set up by way of amendment does not bar the plaintiff’s action, and that she is entitled to judgment for the sum of \$2,563 awarded by the jury, with costs of action.

[WRIGHT, J.]

MEAGHER V. LONDON LOAN AND SAVINGS CO. OF CANADA.

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May 30.

Interest — Mortgage — Bonus — Unusual Form of Transaction — Interest Act, R.S.C. 1927, ch. 102, secs. 6, 7, 8, 9 — Limitations Act — Debt upon Specialty — Period of Limitation — Action to Recover Bonus and Interest — Whether Payment Voluntary — Mistake of Fact — Statutory Protection from Oppression.

A company applied to the defendant company for a loan of \$30,000 upon mortgage of real estate, and it was arranged that the mortgagor should pay the defendant company a bonus of \$3,000 for the advance. Instead of deducting the \$3,000, the defendant company paid to the mortgagor by cheque the \$30,000, less proper deductions for taxes, etc., and the mortgagor paid the defendant company \$3,000, also by cheque. Payments were made from time to time on account of interest. The mortgage becoming in arrear, and the mortgagor-company having gone into liquidation, the defendant company advertised the mortgaged premises for sale. A few days before the day set for the sale, the liquidator paid off the mortgage. The liquidator brought this action to recover the \$3,000 and interest thereon:—

Held, that the bonus transaction offended against the provisions of secs. 6, 7, and 8 of the Interest Act, R.S.C. 1927, ch. 102, and that the liquidator was entitled to recover the amount and interest by virtue of the provisions of sec. 9.

The fact that the transaction was in form different from that in earlier decided cases did not affect the principle of law applicable.

Re Brown (1928), 61 O.L.R. 602, and earlier Ontario decisions, followed.

It was contended that the bonus was not paid for the use of the money but as a consideration for obtaining the loan; but that contention was answered by the Ontario cases referred to.

The Limitations Act did not avail the defendant company: the transaction was in 1922, and the period of limitation was 20 years; the debt, being upon a statute, was upon a specialty.

The money was paid by the liquidator under a mistake of fact, in ignorance of the true situation; and sec. 9 conferred an absolute right of recovery.

If it was paid voluntarily, the general rule that money paid voluntarily cannot be recovered did not apply, the statute being passed to protect a certain class of persons from oppression.

Kearley v. Thomson (1890), 24 Q.B.D. 742, and cases under the Usury Acts therein cited, referred to.

ACTION by the liquidator of the effects and estate of Trans Canada Theatres Ltd. to recover certain moneys paid by that company to the defendant company, in the circumstances stated below.

The action was tried before WRIGHT, J., without a jury, at a Toronto sittings.

R. V. Sinclair, K.C., for the plaintiff.

R. S. Cassels, K.C., and *Hamilton Cassels*, for the defendant company.

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May 30. WRIGHT, J.:—In 1922, the Trans Canada Theatres Limited applied to the defendant company for a loan upon certain theatre premises in London, Ontario, and in the course of the negotiations considerable correspondence passed between the parties. Finally it was arranged that a mortgage should be given to the defendant company for \$30,000 and that the owners should pay the loan company a bonus of \$3,000 for such advance. The arrangement was fully set out in a resolution of the directors of the Trans Canada Treatres Ltd., passed on the 20th March, 1922.

Instead of deducting the \$3,000 paid by way of bonus from the principal of the mortgage-money advanced, the loan company issued a cheque for \$28,505.55 to the mortgagor, being the amount of the principal secured by the mortgage (\$30,000), less taxes, insurance premiums, and solicitor's costs. The mortgagor on its part gave a cheque to the loan company for \$3,000 by way of bonus.

Payments were made from time to time on account of the interest, but the mortgage was allowed to fall into arrear. Finally the loan company advertised the property for sale, and a few days before the sale Mr. Norman H. Robertson, a member of the firm of solicitors for the liquidator, paid off the mortgage.

The plaintiff now brings this action to recover the amount of the bonus and interest thereon, claiming that he is entitled to the relief provided for by sec. 9 of the Interest Act, R.S.C. 1927, ch. 102.

In my view the cases relied upon by the plaintiff, viz., *Singer v. Goldhar* (1924), 55 O.L.R. 267, *Lastar v. Poucher* (1926), 58 O.L.R. 589, *Prousky v. Adelberg* (1926), 59 O.L.R. 471, *Re Brown* (1928), 61 O.L.R. 602, and *Thompson v. Wilson* (1927), 32 O.W.N. 317, establish that a transaction such as that in question offends against the provisions of secs. 6, 7, and 8 of the Interest Act, already cited.*

*6. Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement shewing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance.

7. Whenever the rate of interest shewn in such statement is less than the rate of interest which would be chargeable by virtue of any other provision, calculation or stipulation in the mortgage, no greater rate of interest shall be chargeable, payable or recoverable, on the principal money advanced, than the rate shewn in such statement.

The fact that the transaction was carried on in a somewhat different manner from the transactions in the cases cited does not, I think, affect the principle of law applicable. As stated by Mr. Justice Hodgins in *Lastar v. Poucher* (1926), 58 O.L.R. 589, at pp. 596 *et seq.*, it is the substance of the combined transactions that is important, and the Court is not bound by the form adopted by the parties to carry through an arrangement which is in effect contrary to the provisions of the statute.

Counsel for the defendant company contends that the moneys paid by way of bonus were not paid for the use of the money, but rather as a consideration for obtaining the loan, and therefore on this reasoning the conclusions in the cases cited are erroneous. He relied strongly on the decision of the Court of Appeal in England in *Ex p. Bath* (1884), 27 Ch.D. 509, and certain cases decided in the Western Provinces, also *Mainland v. Upjohn* (1889), 41 Ch.D. 126, as supporting his contention. However I am bound by the decisions of our own Appellate Division and must loyally follow them.

Adopting these decisions as the law applicable to the case, I must hold that the transaction offends against the provisions of the Interest Act; and, unless some other good reason intervenes, the plaintiff is entitled to the relief claimed.

At the trial the defendant's counsel set up the Statute of Limitations as a defence, but I do not think the statute avails his client in the slightest. The debt, if due at all, is upon a statute, and is therefore a specialty: see *Chard v. Rae* (1889), 18 O.R. 371, and in such case the limitation is 20 years.

It is also contended by the counsel for the defendant that the payments were made voluntarily and so cannot be recovered back. To this the plaintiff replies that the payments were made under a mistake of fact. The plaintiff and Mr. Robertson, the solicitor who represented him in paying off the mortgage, both testify that

8. No fine or penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest, secured by mortgage of real estate, which has the effect of increasing the charge on any such arrears beyond the rate of interest payable on principal money not in arrear.

(2) Nothing in this section contained shall have the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrear.

9. If any sum is paid on account of any interest, fine or penalty not chargeable, payable or recoverable under the three sections last preceding, such sum may be recovered back, or deducted from any other interest, fine or penalty chargeable, payable or recoverable on the principal.

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at the time the mortgage was paid off they had not the slightest knowledge of there having been a bonus of \$3,000, and that it was not until some time afterwards that they obtained any information respecting the same.

I accept the evidence of these two witnesses to the effect stated by them. I think it is quite clear that the moneys were paid under a mistake of fact, or rather in ignorance of the true situation. In view of the fact that the property was to be sold in a day or two and that the mortgage was paid off with a view to preventing the sale, I think it could hardly be contended that the payment was a voluntary one, although I do not think it necessary to decide that question.

The provisions of sec. 9 of the Interest Act are a complete answer to the defendant company's contention. That section confers an absolute right for the recovery of moneys paid by way of interest in contravention of secs. 6, 7, and 8 of the same Act.

In any case I am of the opinion that the circumstances of this case bring it within the line of cases referred to by Lord Justice Fry in *Kearley v. Thomson* (1890), 24 Q.B.D. 742, where he refers to cases under the Usury Acts as affording an exception to the general rule that money paid voluntarily cannot be recovered back. The principle underlying the decisions in the cases referred to appears to be that, where a statute is passed to protect a certain class of people from oppression, the general rule that money paid voluntarily cannot be recovered back does not apply; otherwise the very object of the statute would be frustrated.

In my view, the various defences set up fail, and it follows that the plaintiff is entitled to the relief claimed, namely, the return of the bonus of \$3,000, and the interest paid upon the same up to the date the mortgage was paid off and thereafter at 5 per cent. per annum until judgment. If there is any dispute as to this amount, it will be referred to the Master to determine the same.

The plaintiff will be entitled to his costs of action.

[APPELLATE DIVISION.]

RE KYRO RIVER IMPROVEMENT CO. LTD.

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May 31.

Timber—Improvements in Lakes and Rivers—Tolls—Application for Approval of Schedule—Notice—Time for Publication—“For four Successive Weeks”—Meaning of “For” and “Week”—Lakes and River Improvement Act, R.S.O. 1927, ch. 43, secs. 51, 52, 53 (1).

The object of the Lakes and Rivers Improvement Act, R.S.O. 1927, ch. 43, is to enable one who has improved for his own use a lake or river, by dams or slides, to compel others to pay tolls for their use of what but for the statute would be free to them without making any contribution for the construction or maintenance of the improvements.

Section 52 provides that the “operator,” which means the owner or occupier of the works, may demand and receive lawful tolls upon all timber passing through or over such works; and sec. 53 (1) provides that in each year, before the 1st March, the operator shall publish “once a week for four successive weeks,” in a newspaper, a schedule of the tolls proposed, with a notice stating that on a day and hour named he will apply to a Judge for the approval of such tolls:

Held, that a notice published in a daily newspaper on Saturday the 9th February, Saturday the 16th February, Saturday the 23rd February, and Wednesday the 27th February, was not a notice published “once a week for four successive weeks;” and the application, made pursuant to the notice, on the 11th March, was properly dismissed by the Judge.

“For” is not, as used in the section, equivalent to “in,” but implies duration; and “week” does not mean a calendar week.

It is the 1st day of March in each year that governs, and not the date of the application itself, and the time required for the notice must be calculated back from the 1st March.

Re Coe and Township of Pickering (1865), 24 U.C.R. 439, followed.

AN appeal by the company from an order of WRIGHT, J., in Chambers (19th April, 1929), refusing to grant a mandamus to compel the Junior Judge of the District Court of the District of Thunder Bay to hear an application for the approval of certain tolls on pulpwood passing down the McIntyre river.

The application was made to the District Court Judge, but he held that he had no jurisdiction to hear it, as notice of it had not been published in time; and WRIGHT, J., held that the District Court Judge was right in his ruling, and therefore refused to grant a mandamus.

April 30. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, and ORDE, J.J.A.

H. F. Parkinson, K.C., for the appellant company, argued that the word “week” primarily means the period from Saturday midnight to Saturday midnight, referring to legal dictionaries

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and Halsbury's Laws of England, vol. 27, p. 439; that the interpretation of the Lakes and Rivers Improvement Act, R.S.O. 1927, ch. 43, sec. 53, subsec. 1, should be "once in each of four successive weeks;" that the decisions followed by the Court below do not apply because in each case the statute provided for the lapse of a definite time; that the intention of the legislation is to induce the construction of improvements upon rivers by securing tolls; and that the statute is remedial and should be construed liberally in favour of the appellant company: Interpretation Act, R.S.O. 1927, ch. 1, sec. 9; Craies on Statute Law, 2nd ed., p. 67.

H. E. Langford, for the respondents, argued that the statute is a taxing Act and should be strictly construed against the appellant company: *Beck Manufacturing Co. v. Valin* (1908), 40 Can. S.C.R. 523. The cases followed in the Court below apply, and the period of seven days must elapse between each of the individual advertisements required by the statute.

The appeal was dismissed by the Court at the close of the argument.

Reasons for the dismissal were given subsequently.

May 31. LATCHFORD, C.J.:—The appeal was dismissed at the close of the argument, Masten, J.A., doubting or dissenting at the time, but on further consideration agreeing with the other members of the Court.

As the case involves the construction for the first time of important sections of the Lakes and Rivers Improvement Act, R.S.O. 1927, ch. 43, it has been thought desirable that the grounds for the dismissal should be stated.

Part V. of the Act concerns the tolls that may be charged by an "operator" like the appellant company, which has made improvements calculated to facilitate the floating of timber down a lake or river.

The sections in question here are:—

"52. The operator may demand and receive the lawful tolls upon all timber passing through or over such works, and shall have free access to such timber for the purpose of measuring or counting it.

"53.—(1) In each year, prior to the first day of March, the operator shall publish once a week for four successive weeks in a newspaper published in the county or district in which the works are situate, a schedule of the tolls proposed to be charged together with a notice stating that on a day and hour named he will apply

to a judge of such county or district for the approval of such tolls."

Subsection 2 provides that before publication of the notice the operator shall apply to such a Judge to fix the time for the hearing of the application so that it may be inserted in the notice.

The application was duly made on an unstated date, probably on the 8th February. Next day, Saturday the 9th, too late to enable the notice to be published for four successive weeks "prior to the first day of March," a schedule of the proposed tolls and notice of the day and hour appointed to fix them was first published. The notice was also published on Saturday the 16th, Saturday the 23rd, and Wednesday the 27th days of February.

On the day appointed the learned District Court Judge declined to hear the application, on the ground that the notice had not been published conformably to the statutory requirement.

His opinion was affirmed by Mr. Justice Wright and by this Court.

Mr. Parkinson argued that the learned District Court Judge was wrong in holding that the statute had not been complied with, and that therefore his decision should have been reversed. He urged that, while the statute made provision for the imposition of a toll or tax, it was remedial in its nature, and a liberal construction should be given to it; and, so construed, not four weeks' notice was required to be published, but only notice in four successive weeks, and this had been done.

By sec. 9 of the Interpretation Act, R.S.O. 1927, ch. 1, it is "such fair, large and liberal construction" that shall be given "as will best ensure the attainment of the object of the Act . . . according to the true intent, meaning and spirit thereof."

The object of the Act in question is to enable one who has improved for his own use a lake or stream by dams or slides to compel others to pay tolls for their use of what but for the statute would be free to them without making any contribution for the construction or maintenance of the improvements.

Many such persons are often, if not usually, busily engaged in remote districts during winter seasons. The Legislature manifestly considered that, while they ought to pay tolls to the operator who had facilitated the getting of their products to a shipping or marketing point, they should be given reasonable notice of the precise amount of the proposed tolls, and of the time and place where they were to be fixed. The time for giving notice, how it was to be given, and the duration, were definitely prescribed. The publication was to be completed before the northern streams ordinarily became floatable. It was to be in each year once a week for

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four successive weeks prior to the 1st day of March. The word "for," when used with reference to time, plainly implies *duration*. When we say "for an hour," "for a day," "for a month," "for a year," we mean, during or throughout an hour, a day, a month, or a year. "For" in the Act is not the equivalent of "in," as it would be if Mr. Parkinson's argument were to prevail, that the publication of the notice *in* four weeks is *for* four weeks. According to that contention, publication on the last day of a week and on the first day after a lapse of two weeks, or within 16 days, would be publication once a week *for* four successive weeks; while in truth it is but publication once a week *in* four successive weeks.

Authority on the point in question is not wanting.

In *Re Coe and Township of Pickering* (1865), 24 U.C.R. 439, the statute considered required publication to be made "for four consecutive weeks." The notice was published, as in this case, in four successive weeks, and the opinion of the Court, written by Draper, C.J., states that it was "persistently argued" that the statute was thus complied with. The judgment is to the contrary.

Leach v. Burr (1903), 188 U.S. 510, in the Supreme Court of the United States, determined a case depending on a statutory requirement of publication of a notice "at least twice a week for four successive weeks." Mr. Justice Brewer, in stating the opinion of the Court, refers (p. 512) to *Early v. Homans* (1853), 16 How. 610, where publication was to be "once in each week for at least twelve successive weeks," and quotes with apparent approval from the judgment of Wayne, J., in the Circuit Court of the District of Columbia, which was affirmed by the Supreme Court, the following statement:—

"The preposition 'for' means of itself duration when it is put in connection with time, and as all of us use it that way, in our everyday conversation, it cannot be presumed that the legislature . . . did not mean to use it in the same way. Twelve successive weeks is as definite a designation of time, according to our division of it, as can be made."

On similar grounds the appeal in this case was dismissed.

RIDDELL, J.A., at the hearing expressed the opinion that the appeal should be dismissed.

MASTEN, J.A.:—Appeal from the order of Wright, J., refusing a mandamus directed to the Junior Judge of the District Court of Thunder Bay, requiring him to entertain jurisdiction of an application by the appellant company to fix tolls under the Lakes and Rivers Improvement Act, R.S.O. 1927, ch. 43.

The learned Judge declined jurisdiction on the ground that the publication of the schedule of proposed tolls and of the notice of appointment to settle the same, as required by sec. 53 of the Lakes and Rivers Improvement Act, was a condition absolute, and not directory, on which his jurisdiction to fix the schedule of tolls depended, and that the publication which had here taken place did not fulfil the requirements of the statute, which reads as follows:—

“53.—(1) In each year, prior to the first day of March, the operator shall publish once a week for four successive weeks in a newspaper published in the county or district in which the works are situate, a schedule of the tolls proposed to be charged together with a notice stating that on a day and hour named he will apply to a judge of such county or district for the approval of such tolls.”

What occurred was that the applicant attended before the Judge and procured an appointment pursuant to the statute, and thereupon published in the *News Chronicle*, a newspaper published in the district of Thunder Bay, the following notice:—

“Notice is hereby given, pursuant to section 53 of the Lakes and Rivers Improvement Act, being chapter 43 of R.S.O. 1927, that Kyro River Improvement Company Limited proposes to charge the tolls hereinafter set out upon all timber passing over the improvements made by it on the waters hereinafter described, that is to say:—

“For all pulpwood passing down McIntyre river, in the district of Thunder Bay, twenty-seven (27) cents per cord.

“And further take notice that his Honour Judge McKay, the Junior Judge of the District of Thunder Bay, has appointed Monday the 11th day of March, 1929, at eleven o’clock in the forenoon, at the court-house in the city of Port Arthur, in the district of Thunder Bay, to hear an application to approve of the said tolls, and that an application will then be made to him for that purpose, pursuant to the said section.”

The above notice was published on the following dates, 9th February, 16th February, 23rd February, and 27th February.

The learned District Court Judge and Wright, J., have held that publication once a week for four successive weeks means four successive publications of the notice on dates not less than seven days apart, so that at least 21 days shall elapse between the first and the last publications of the notice. Here not more than 18 days elapsed between the first and the last publications, and consequently they have held that the appellant had failed to publish “once a week for four successive weeks.”

Mr. Parkinson, for the appellant company, argued substantially as follows:—

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"The expression 'once a week for four successive weeks' is ambiguous. It may have the meaning attributed to it in the courts below, or it may mean publication once in each of four successive weeks, as the term 'week' is understood in common parlance, that is the period from Sunday to Sunday."

He quotes Halsbury's Laws of England, vol. 27, para. 868, as follows:—

"A week is properly the time between midnight on Saturday and the same hour on the next succeeding Saturday, but the term is also applied to any period of seven successive days."

"If the former meaning is adopted, the publication in the present case was adequate, for it was made as follows: first, on Saturday of the week beginning Sunday the 3rd February; second, on Saturday of the week beginning Sunday the 10th February; third, on Saturday of the week beginning 17th February; fourth, on Wednesday of the week beginning 24th February; and thus during the four successive weeks of the 3rd, 10th, 17th, and 24th February the requisite advertisement was duly published."

Counsel also observed incidentally that the application was returnable on the 11th March; and, had it been possible to have made a publication three days later, namely on Saturday the 2nd March, the question now before the Court could not have arisen, but such publication was not possible because, under the Lakes and Rivers Improvement Act, the publication must be completed before the first of March.

He refers to this as making plain that the orders of the courts below depend upon a technicality and not on any real absence of notice to the parties concerned.

These arguments commended themselves to my mind. Further it appeared to me that the somewhat hostile or strict construction which is applied to taxation statutes and to the levying of tolls on toll-roads was not applicable to the construction of sec. 53, but on the contrary that the statute should receive such fair, large, and liberal construction and interpretation as would best ensure the attainment of the object of the Act and of the provision and enactment according to the true intent, meaning, and spirit thereof (Interpretation Act, sec. 9).

The Legislature has considered it inequitable that persons who have not contributed to the cost of river and lake improvements should get the use and benefit of them without paying anything, and has passed the statute in question for a purpose which it deemed for the public good, namely, encouragement of needed improvements and equitable dealing between different classes of the community.

Moved by these considerations, I thought that the phrase "published once a week for four successive weeks," being in my view susceptible of the meaning attributed to it by the appellant company's counsel, ought to receive that interpretation as tending to promote the purpose of the Act, rather than that the purpose should be frustrated (at least for 1929) by the other construction.

Further consideration and perusal of the decided cases has convinced me that the view which I so entertained was erroneous, and that the meaning of the words in question had been so definitely determined by the series of decisions in our own courts beginning with *Re Coe and Township of Pickering*, 24 U.C.R. 439, that the Legislature must be presumed, when this section was enacted, to have employed the phrase in question in the sense which has been ascribed to it by the courts.

For this reason I am compelled to abandon the view that I entertained at the close of the appellant company's argument and to give my adherence to that entertained by my brethren dismissing the appeal. I should add that I have expressed my views in case they may be of service in another place if application is made to amend the statute.

ORDE, J.A.:—The Lakes and Rivers Improvement Act, R.S.O. 1927, ch. 43, enables companies incorporated under its provisions for the purpose of constructing dams and slides in public rivers to charge tolls for the use thereof by others. Such tolls must, however, be approved annually by the Judge of the county or district in which the works are situate, after publication of due notice setting forth the schedule of the tolls proposed to be charged for the coming year and stating the day and hour when the application will be made.

Section 53 provides for the procedure to be followed by the operator (defined in sec. 51 as meaning the owner or occupier of the works), subsec. 1 of which is as follows:—

"In each year, prior to the first day of March, the operator shall publish once a week for four successive weeks in a newspaper published in the county or district in which the works are situate, a schedule of the tolls proposed to be charged together with a notice stating that on a day and hour named he will apply to a judge of such county or district for the approval of such tolls."

The company, having first had the Judge of the District of Thunder Bay fix the 11th March, 1929, at 11 a.m., and the courthouse in Port Arthur, as the time and place for the hearing of the application, published notice thereof in the *News Chronicle*, a daily newspaper published at Port Arthur, on Saturday the 9th Febru-

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When the application came before the learned District Court Judge he held that he had no jurisdiction to hear it, as the notice had not been first published in time. From the order of Wright, J., refusing a mandamus to compel the District Court Judge to hear the application, the company has appealed.

I think the appeal must fail. It may seem hard that the company's right to exact tolls for this year should be denied because of a few days' delay in publishing the notice, especially as more than 4 weeks were allowed between the date of first publication and the hearing of the application, but it is the first day of March in each years that governs, and not the date of the application itself, and the time required for the notice must be calculated back from that date and not otherwise.

It was argued that "week," as used in subsec. 1, means a calendar week, that is, the seven days beginning at the earliest moment of Sunday and ending at midnight the following Saturday, and that publication on any day of one such week constitutes a week's publication without reference to the particular day of the next week's publication. If this were the meaning of the Act, it would lead to this extraordinary result: if the 1st March were a Tuesday, then notice published on Monday the 28th February and on the three preceding Saturdays, namely, the 12th, 19th, and 26th February, would constitute publication "once a week for four successive weeks," although the first notice would be given only 17 days before the 1st March. The absurdity of this argument is made more apparent if, instead of four weeks, the statute had required publication "once a week for two successive weeks." In that case, publication on Saturday the 26th and Monday the 28th February would be sufficient, though in fact only three days' notice would have been given.

The words "for four successive weeks" clearly mean for a period of four successive weeks, that is for 28 days, and in my opinion, the learned District Court Judge was right when he held that the first publication of the notice must be made not later than the 31st January in order to comply with the Act.

The appeal must be dismissed.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

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Church—Property of Congregation—Trusts—Presbyterian Church in Canada—United Church of Canada Act, 1925, 15 Geo. V. ch. 125, secs. 2 (c), 4, 6, 17—63 Vict. ch. 135, sec. 5—Consent—Powers of United Church—Jurisdiction of Court.

A majority of the congregation of a Presbyterian church at G., in January, 1925, voted in favour of union with two other denominations. The plaintiff, who had voted against union, brought this action, on behalf of himself and other members of the congregation who had voted against union, for an injunction restraining the trustees of the property of the church at G. from using or disposing of it otherwise than by transferring it to the plaintiff or trustees for the plaintiff and other members of the Presbyterian Church in Canada at G.; and for other relief:—

Held, that the congregation of the church at G., after entering the union, was entitled to consent and did effectually consent to the application of the provisions of sec. 4 of the United Church of Canada Act, 1925, 15 Geo. V. ch. 125 (Ont.), to the property in question; and, the Act having vested in the United Church the power of determining how the trusts upon which the property was held were to be performed, and having provided that what was done in pursuance of the Act should not be deemed a breach of the trusts, but a compliance therewith, the Court had no jurisdiction to grant the relief asked.

Sections 2 (c), 4, 6, and 17 of the Act of 1925, and sec. 5 of an Act incorporating the Board of Trustees of the Presbyterian Church in Canada, 1900, 63 Vict. ch. 135 (Ont.), considered.

Per MAGEE, J.A.:—The deed by which the property was conveyed to the trustees of the Presbyterian Church at G. expressly stated that the property was for the site of a church and burying ground for the use of a congregation of Presbyterians whose ministers, elders, and members make the Westminster Confession the rule by which public worship and divine service are to be conducted in the church built upon the land, in trust and confidence that the trustees would permit ministers adhering to the Westminster Confession to preach and perform religious services, etc. The plaintiff being unable to shew that the present minister, elders, or members of the church did not make the Westminster Confession the rule by which public worship and divine service are conducted, or did not adhere thereto, and it being only in regard to these provisions in the deed that there could be any question as to the statutes applying, the action failed.

Per MIDDLETON, J.A.:—The Legislature has left it to the United Church to determine whether the trusts declared in respect of church property are now being observed and so to determine whether the property now in question belongs to the new body created by the Act or remains held in trust for the old church; and, the Legislature being supreme, the Court cannot interfere: *Re Goodhue* (1872), 19 Gr. 366; *Florence Mining Co. v. Cobalt Lake Mining Co. Ltd.* (1909), 18 O.L.R. 275, 279; and *McLean v. Ballantyne* (1928), 62 O.L.R. 443, 451.

An appeal by the plaintiff from the judgment of ROSE, J., at the trial (4th May, 1928), dismissing the action, which was

App. Div. brought by the plaintiff, on behalf of himself and other members of the congregation of the Presbyterian Church at Grafton, to restrain the defendants, trustees of the church property, from using or disposing of it otherwise than by transferring it to the plaintiff or trustees for the plaintiff and other members of the Presbyterian Church in Canada at Grafton; and for other relief.
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April 12 and 22. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and MIDDLETON, J.J.A.

J. H. Fraser, K.C., and *N. S. Macdonnell*, K.C., for the appellant. The congregation at Grafton is now part of the United Church of Canada. The United Church is not required to conform to the Westminster Confession of Faith. The congregation is now prevented from going to the church and worshipping according to the Westminster Confession in accordance with the trust-deed. The trust-deed had reference not merely to the form of service but also and more especially to the doctrines or beliefs contained in the Westminster Confession of Faith. If a congregation votes itself into the Union its property follows, but it can only be used in accordance with the terms of the trust originally imposed, i.e., the congregation must continue to worship according to the Westminster Confession and has no right to amalgamate with a Methodist congregation. There is now no Presbyterian Church within the description of the trust-deed, and therefore the trust must fail. Neither sec. 4 nor sec. 17 of the United Church of Canada Act, 15 Geo. V. ch. 125 (Ont.), is wide enough to carry this church property into the Union. In any event, the provisions of sec. 6 regarding the vote of the congregation have not been complied with, because the consent, if any, was given after the congregation had entered the union.

G. W. Mason, K.C., and *H. E. Whitehead*, for the defendants, respondents. Section 6 of 15 Geo. V. ch. 125 refers to property held by the congregation solely for its own benefit and in which the denomination at large had no reversionary interest. This section is inapplicable to the property in question or any other property of the Presbyterian church in Ontario because by an Act incorporating the Board of Trustees of the Presbyterian church in Canada, 1900, 63 Vict. ch. 135, sec. 5, an interest in the congregational property is placed in the denomination at large. But, in any event, a resolution of the congregation was passed in conformity with the requirements of sec. 6, *supra*. Sections 4 and 17 of the statute of 1925 are the ones applicable. This trust comes under the head of the model trust-deed (schedule A.), and the trustees are dealing with it pursuant to the statute. The trust in question was destroyed by an Act of 1861, 24 Vict. ch.

124 (Can.), secs. 1 and 9, and subsequent legislation which changed the Westminster Confession of Faith. The congregation in question is now and has since 1861 been violating the express wording of the trust. The trustees in 1925 were holding the property upon the original trusts as legally changed by statute. The evidence shews that the language of the trust-deed as to adherence to the Westminster Confession as the rule of public worship has been complied with. There has been no departure from the trust in this respect.

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Fraser, K.C., in reply. Under sec. 17 of the statute of 1925, *supra*, the United Church must exercise a *bonâ fide* discretion regarding the interpretation of the trusts. The evidence in this case shews a lack of such discretion by arranging or permitting a union with a Methodist congregation. Reference to *Attorney-General v. Munro* (1848), 2 DeG. & Sm. 122; *General Assembly of Free Church of Scotland v. Overtoun*, [1904] A.C. 515, at pp. 611, 612, 616-7, 620-21, 625, 627, 644-6, 667, 669, 675, 680-1, and 691; *Attorney-General v. Anderson* (1888), 57 L.J. Ch. 543; *Attorney-General v. Shore* (1843), 11 Sim. 592, at p. 624; *Dill v. Watson* (1836), 2 Jones (Ir. Ex.) 48; Sanders on *Uses and Trusts*, 4th ed., vol. 1, p. 263.

June 4. MULOCK, C.J.O.:—This is an appeal from the judgment of Rose, J., who dismissed the action. The plaintiff, John Aird, on behalf of himself and other members of the Presbyterian Church in Canada at Grafton who voted against union with the United Church of Canada, brought this action for an injunction restraining the defendants, trustees of the church property in question, from using or disposing of it otherwise than by transferring it to the plaintiff or trustees for the plaintiff and other members of the Presbyterian Church in Canada at Grafton; and for other relief.

In the statement of claim the plaintiff alleged that for many years he had been and still was a member of the congregation of the Presbyterian Church at Grafton known as St. Andrew's Presbyterian Church; that when a vote of union with the United Church of Canada was taken in the said congregation in the month of January, 1925, he voted against such union; that since the vote was taken he and other members of the congregation who had voted against union had continued to worship together as a congregation, seeking to preserve and continue the St. Andrew's congregation as a congregation of Presbyterians which makes the Westminster Confession of Faith the rule by which public worship and divine service are conducted; that the defendants claim to be trustees of the

App. Div. property in question for a United Church congregation at Grafton, and are preventing the plaintiff and others from worshipping therein as a congregation of Presbyterians.

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The defendants allege that the property in question was held by its trustees for the benefit of the congregation in connection with the Presbyterian Church in Canada; that by the Act of 63 Vict. ch. 135 (Ont.) the Presbyterian Church in Canada became entitled to an interest therein; that the Presbyterian Church in Canada united with the Methodist and Congregational churches in Canada and formed the United Church of Canada, which, by virtue of an Act of the Legislature of Ontario, the United Church of Canada Act 15 Geo. V. ch. 125 (Ont.), succeeded to the interests of the Presbyterian Church in Canada in the said property; and the defendants claim that the Presbyterian congregation at Grafton, having voted in favour of union, became a congregation in the United Church, and the defendants allege that they hold the said property, under the provisions of sec. 4 of 15 Geo. V. ch. 125, for the benefit of the said congregation as a part of the United Church of Canada, subject to the terms of schedule A. to the said last mentioned Act. If such be the effect of the legislation, it is unnecessary to consider other questions raised by Mr. Fraser.

Subject to the provisions of sec. 6, it is declared in substance, by sec. 4, that all property in Ontario belonging to or held in trust for any congregation of any of the negotiating Churches shall be held for the benefit of the same congregation as a part of the United Church. Section 6 declares that property belonging to a congregation, "whether a congregation of the negotiating churches or a congregation received into the United Church after the coming into force of this Act, solely for its own benefit, and in which the denomination to which such congregation belongs has no right or interest, reversionary or otherwise, shall not be subject to the provisions of section 4 hereof or to the control of the United Church, unless and until any such congregation at a meeting thereof regularly called for the purpose shall consent that such provisions shall apply to any such property."

Mr. Mason pointed out that sec. 6 applied only to property held by a congregation solely for its own benefit, and contended that under the Ontario Act of 1900, 63 Vict. ch. 135, sec. 5, if the congregation ceased to exist, the property would vest in the trustees of the Presbyterian Church in Canada for other purposes than those of the congregation, and that, therefore, not being held in trust solely for its benefit, sec. 6 had no application.

Section 5, relied on by Mr. Mason, reads as follows:—

"All lands and premises which have been or shall hereafter at any time be held by any trustee or trustees for any congregation which shall have ceased to exist or has become disorganised shall vest in the said Board of Trustees on trust to sell the same and pay over the proceeds of the said sale to the Treasurer of the said Church for the benefit of the Home Mission scheme thereof or as may be otherwise determined by the General Assembly of the said Church."

This section applies only (a) to a congregation which, at the time of the passing of that Act (30th April, 1900), shall have ceased to exist, and (b) to a congregation which has become disorganised.

The St. Andrew's congregation at Grafton had not, when sec. 5 came into effect, ceased to exist, and there is no evidence that at any time it had become disorganised; and, therefore, in my opinion, sec. 5 does not operate on the interests of the congregation in the said property and the same is not subject to the provision of sec. 4 unless and until the congregation "at a meeting thereof regularly called for the purpose shall consent that such provision shall apply" to the said property.

On the 5th April, 1928, at a meeting regularly called by the St. Andrew's congregation at Grafton of the United Church of Canada, it was resolved that the "congregation, pursuant to sec. 6 of the said Act" (being ch. 125 of the statute of Ontario of 1925), "consents that the provisions of sec. 4 of the said Act shall apply to the property both real and personal belonging to or held by or in trust for or to the use of the congregation."

Mr. Fraser contended that because of the congregation at Grafton having entered the Union it had lost the power to give the consent contemplated by sec. 6. I do not share that view. The body of people who constituted the congregation of the Presbyterian St. Andrew's Church at Grafton continued as a congregation when it entered the United Church, and, subject to the provisions of sec. 4, it had the same interest in the property in question when it became a congregation as a part of the United Church as it enjoyed before entering the Union. Further, clause (c) of sec. 2 of 15 Geo. V. ch. 125 defines "congregation" as meaning "any . . . church . . . or other local unit for purposes of worship in connection . . . with any of the negotiating churches or of the United Church of Canada." Further, sec. 6 entitles a congregation of the negotiating churches or "a congregation received into the United Church after the coming into force of this Act" to consent to the application of the provisions of sec. 4 to property belonging to or held in trust for such con-

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gregation. I, therefore, am of opinion that the congregation of St. Andrew's Church at Grafton, after entering the Union, was entitled to and did effectually consent to the application of the provisions of sec. 4 to the property in question.

There remains to consider the effect of the Act (15 Geo. V. ch. 125) in respect of the property in question.

Section 4 requires it to be held for the benefit of what was formerly the congregation of the Presbyterian Church of St. Andrew's at Grafton, but which is now a congregation as part of the United Church upon the trusts and subject to the terms of schedule A. (the model deed). Section 17 declares that any trust in respect of such property prior to the coming into effect of the Act "shall continue to exist and to be performed as nearly as may be for the like purposes or objects in connection with the United Church as the United Church may determine, and anything done in pursuance of the Act of incorporation or of this Act shall not be deemed to be a breach of any such trust, but shall be deemed to be in compliance therewith and a performance thereof, and the entry of any congregation into the United Church shall not be deemed a change of its adherence or doctrines or religious standards within the meaning of any such trust." Under this section the original trusts are to be performed as nearly as may be for the like purposes and objects in connection with the United Church as that church shall determine, and, so performed, the performance shall not be deemed a breach of trust but a compliance therewith. Thus, this legislation having vested in the United Church the power of determining how the trusts are to be performed, and having provided that what is done in pursuance of the legislation in question shall not be deemed a breach of trust, but on the contrary shall be deemed to be a compliance therewith, this Court has no jurisdiction to grant the relief asked; and the appeal should be dismissed with costs.

MAGEE, J.A.:—I agree that this appeal should be dismissed. The deed from John Grover to the trustees of the Presbyterian Church at Grafton was expressly stated to be for the site of a church and burying ground for the use of a congregation of Presbyterians whose minister, elders, and members make the Westminster Confession of Faith the rule by which public worship and divine service are to be conducted in the church built or to be built upon the land, in trust and confidence that the trustees shall at all times thereafter permit any Presbyterian minister or preacher, ministers or preachers, he or they being a member or members of the said Presbyterian Church and duly adhering to

the said Confession of Faith, to preach and perform religious service in the church and burial service in the said burying ground, said preacher or preachers being duly elected according to the constitution and laws adopted at a general meeting of the congregation as soon as practicable after the execution of the deed.

Counsel for the appellant was unable to shew that the present minister, elders, or members of the church did not make the Westminster Confession the rule by which public worship and divine service are to be conducted or that the minister or preacher did not adhere thereto.

It is only in regard to those provisions in the deed that there could be any question as to the statutes applying, and the evidence as to them fails.

HODGINS, J.A., agreed with MULOCK, C.J.O.

MIDDLETON, J.A.:—I agree with the conclusions arrived at by my Lord and desire to add little to what he has written.

While many may regard the Church Union legislation as harsh and unjust, and as oppressive and unfair to the minority of the Presbyterian Church who adhere to Calvinism and cannot regard a colourless creed smacking much of Arminianism as at all equivalent to the Westminster Confession of Faith, it must not be forgotten that Parliament is supreme and has full control over property and civil rights and can as to them do as it determines without any question of the morality of its action.

This was pointedly put in *Florence Mining Co. Ltd. v. Cobalt Lake Mining Co. Ltd.* (1909), 18 O.L.R. 275, 279, where it was said:—

“The Legislature within its jurisdiction can do everything not naturally impossible, and is restrained by no rule human or divine. If it be that the plaintiffs acquired any rights . . . the Legislature had the power to take them away. The prohibition ‘Thou shalt not steal’ has no legal force upon the sovereign body.”

Much the same thing was said long ago in *Re Goodhue* (1872), 19 Gr. 366, where it was held that the Legislature has the power to declare that the property of A. shall be deemed to be the property of B., and that the Courts must give effect to this exercise of the legislative power. Draper, C.J.A., at p. 383, said:—

“A Court of Justice cannot set itself above the Legislature. It must suppose that what the Legislature has enacted is reasonable; and all, therefore, that we can do, is to try and find out what the Legislature intended.”

Here it seems plain that the Legislature intended to leave it to the United Church to determine whether the trusts declared by

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Magee, J.A.

App. Div. pious men of old who thought much of certain doctrines are now
1929. being observed and so to determine whether the property in question belongs to the new "body corporate and politic" created by the Act or remains held in trust for that venerable church which Parliament cannot destroy because it is not a body politic amenable to the civil courts or to Parliament. Our duty therefore is to give effect to the law as we find it. Those who contributed to the building of a particular church, hoping and declaring that it should forever be used for a particular purpose, and who now find that it is being used for some other purpose and has been taken from them without compensation, must realise that the contest was lost when the Legislature passed the Act in question and that the courts cannot now aid them.

Middleton, J.A. The effect of the legislation is well stated by my brother Orde in *McLean v. Ballantyne* (1928), 62 O.L.R. 443, at p. 451:—

"The entry into the United Church of any Presbyterian congregation carried with it the congregational property and in the eyes of the law did no violence to the trusts upon which that property was held."

The two bodies, the "uniting" and the "non-concurring Presbyterians of Canada," are both in reality "keeping alive the faith and tenets of Presbyterianism," a thing hard to understand, yet supported by the evidence in this case.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

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SMITH v. NATIONAL GUARANTY CO.

June 4.

Insurance (Fire)—Destruction of Intoxicating Liquors Acquired Illegally—Liquor Control Act, R.S.O. 1927, ch. 257, sec. 72 et seq.—Absence of Insurable Interest—Failure of Action on Policies.

A sale of a large quantity of intoxicating liquor to the plaintiff S., ostensibly for export, was found to be illegal under the Liquor Control Act, R.S.O. 1927, ch. 257, sec. 72 et seq.; and it was held, that no title to or property in the liquor passed to S. by the sale, and so he had no insurable interest at the time of its destruction by fire; and he could not recover upon policies insuring him against such loss.

Gedge v. Royal Exchange Assurance Corporation, [1900] 2 Q.B. 214, and *O'Hearn v. Yorkshire Insurance Co.* (1921), 51 O.L.R. 130, applied and followed.

AN appeal by the defendants from the judgment of McEvoy, J., at the trial of an action against several insurance companies,

awarding the plaintiffs \$7,734.80 for the loss of a quantity of intoxicating liquors insured by the defendants and destroyed by fire at an export wharf or pier.

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April 22 and 23. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

Waldon Lawr, for the appellants. The learned trial Judge erred in refusing the appellants' application at the trial to allow an amendment alleging an illegal title to the goods insured. There was not sufficient evidence to prove that the whisky alleged to be in the burned building was ever purchased. With regard to beer, the evidence disclosed that the plaintiffs were illegally in possession of it, i.e., it was in a place where the law did not permit it to be: Liquor Control Act, R.S.O. 1927, ch. 257, sec. 141. The appellants' policy covered stocks of liquor, but not illegal stocks of liquor. The illegal or unlawful interest in the property was never within the contemplation of the appellants. Reference to *Rex v. O'Keefe's Beverages Ltd.* (1926), 31 O.W.N. 124; *Dominion Fire Insurance Co v. Nakata* (1915), 52 Can. S.C.R. 294.

G. McEwan, for the plaintiffs, respondents. All goods were purchased by the respondents for legitimate export trade. The Liquor Control Act therefore does not apply. If the business carried on by the respondents is legal within Ontario, the circumstance that the law is broken incidentally cannot affect the contract between the insurer and the insured, unless the "insurable interest" is affected. Reference to *Niagara Fire Insurance Co. v. De Graff* (1863), 12 Mich. 124.

June 4. The judgment of the Court was read by HODGINS, J.A.:—The evidence in this case is most confused and confusing. The testimony on behalf of the plaintiffs was very loose, and no proper or intelligible explanation was elicited in the process of trying to separate the various shipments or receipts of beer or endeavouring to trace them from vendor to purchaser. It is consequently almost impossible to find any firm ground as to the sale and purchase of beer such as arises in regard to the whisky, and this makes it extremely difficult for any court to say that the learned trial Judge, who saw and realised the shifty character both of the evidence and of the witnesses, was wrong in coming to the conclusion that cases of beer to about the number alleged were in fact in the warehouse and consumed by fire. Nor is it possible to say judicially that it had not been legitimately acquired by Smith or Lamar.

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But with regard to the 125 cases of whisky the case is different. The insured, the plaintiff Cecil Smith, in connection with this claim in his evidence describes what was contained in them as "gin" and "Johnnie Walker," then "Irish whisky and Scotch," then "Walker's and Black and White," and finally "all Scotch whiskies," denying that he had any gin. When the delivery-slip is produced it is found to contain 20 cases of Gordon gin and 105 cases of Scotch whisky. This evidence shews how little Smith or his caretaker, Schuchard, knew of the contents of the bags said to contain whisky, and naturally throws much light on their credibility.

The evidence as to the bottles seen after the fire is not very convincing. Some witnesses saw what were "like whisky bottles," "ordinary quart bottles," "Canadian bottles," although the plaintiffs' case was that all was Scotch whisky.

Assuming, however, that there were in fact 125 cases of whisky, it is necessary to note an application made at the trial by the defence to allow an amendment which was formulated in these words:—

"The defendants further say that the plaintiffs had an illegal interest in the goods insured under the policies in question and that their action is not maintainable."

In answer to this application the learned Judge said he would leave the matter open and would deal with it in his judgment. He, however, overlooked it when judgment was finally delivered. We think the leave should have been given, as it was asked for at the opening of the case and evidence was directed to support it.

It appears from the plaintiff Smith's evidence that it was not till the 6th October, 1927 (the date of the policies sued on), that the goods in the warehouse which was burnt down on the 25th October, 1927, were insured by the defendant companies. He also gives the history of the transaction, which, as gathered from his evidence, so far as he speaks from his own knowledge, is as follows: He came in contact with a man named Pyle on the Smith dock on the 15th or 16th day of October, 1927, and ordered whisky from him, which was later delivered to the Smith dock by truck said to come from Walkerville, with a delivery-slip dated the 22nd October, 1927. This (a typewritten slip with same parts in ink which I have indicated by underlining) is headed as follows:—

"Louis Pyle, Montreal, P.Q. Sold to D. Lamar.

Address Detroit, U.S.A., via L. & K. B.C. . . Charge C. Smith."

Then follows the description of the liquor which I have already summarised.

No evidence was adduced to shew that the contents of this slip were correct as to description of liquor or as to the origin and mode of shipment of the liquor or the residence or headquarters of Pyle. The origin so far as the evidence goes is Walkerville.

Turning to Smith's and Lamar's evidence on discovery (put in at the trial) it appears that Smith swore he owned the whisky, while at the trial he said Lamar owned it. Lamar's account may be gathered from the following extracts from his examination on discovery:—

"Q. To whom did this liquor belong in connection with which you are making this claim—who owned that? A. Well, the liquor was bought for me through this man Smith. Yes—I own it as soon as it reaches the other side.

"Q. Don't you own it when it reaches the dock? A. Well, this man just bought it through my orders—he just filled my orders, that's all he done. I send my men over for an order of whisky—they pay him and he brings it over.

"Q. Then, so far as Mr. Smith is concerned, he, on your order and as your agent, bought the beer and whisky, and you personally, or somebody on your behalf, would pick it up from the dock and export it yourself? Is that right? A. Yes.

"Q. Export it to the United States? A. Yes, sir.

"Q. How would you give these orders to Mr. Smith—personally, by letter, by telephone, or how? A. Well, I had men on boats on the river.

"Q. Agents of yours—and who would deliver to Mr. Smith an order for so much beer and so much whisky? A. Yes.

"Q. When you personally, or your agents, obtained delivery of beer or whisky at the dock, did you not receive an invoice or any documents of any kind with the beer or whisky? A. No, we never did. The only thing we had was the clearance papers and the Customs—that's all I ever got—sometimes I would get a little slip of how much was on each boat.

"Q. Have you any records you can produce to me covering your orders to Mr. Smith to buy for you that amount of whisky and beer? A. No, I haven't now—not right now.

"Q. Did you have at the time of this fire? A. I knew what my order was that I deliver to people in Detroit.

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"Q. How did you deliver that order—in writing? A. Well, the way I done—possibly a saloon man would give me an order for 25 cases of beer and one case of whisky—I would take down the order and give my man the order and they would pull it over that night or in the morning, or whatever time they could get away.

"Q. When you did order Mr. Smith to buy, as your agent, beer or whisky, did you pay him at the time you ordered it? A. Well, my man paid him. Every time they came over the river they paid him cash for everything they got.

"Q. That's a little different. They paid him cash for what they bought, but whose money paid it in the first place? A. It was my money.

"Q. When did you give Mr. Smith that money? A. My men would give it to him."

I think the fair and indeed the only reasonable inference is that there was a sale in Ontario of whisky by Pyle to Smith carried out so far as it appears by a delivery from Walkerville to Smith's dock, and that that dock contained whisky for sale there and not whisky in due course of export. There is no proof of a sale in Montreal or Vancouver by Cohen and Leon nor anything to support the idea that the whisky came from either of these points in response to the order to Pyle. That rests wholly on the assumption that the delivery-slip proved these facts. There is no evidence here of a sale and purchase by Lamar from Smith of this whisky. The former's testimony shews only cash sales at the dock-side, when Lamar at Detroit had himself an order for whisky and sent his men and his boat to buy it and smuggle it into the United States.

The sale is illegal under the Liquor Control Act, R.S.O. 1927, ch. 257, sec. 72 *et seq.*, and the only question to be decided is whether any title passed to Smith which was an insurable one at the time the policies attached, and whether the companies can set up the illegality of the transaction which resulted in the transfer to Smith's dock of the whisky in question.

In *Gedge v. Royal Exchange Assurance Corporation*, [1900] 2 Q.B. 214, Kennedy, J., said (p. 219) :—

"It appears to me that when upon the trial of an action the plaintiffs' case, as happens here, discloses that the transaction which is the basis of the plaintiffs' claim is illegal, the Court cannot properly ignore the illegality and give effect to the claim."

In this case the transaction as shewn is unlawful, and it would therefore seem proper for the Court to take notice of it.

I think that no title to or property in the whisky passed to Smith by the sale in question, and so he possessed no insurable interest at the time of the loss.

In *O'Hearn v. Yorkshire Insurance Co.* (1921), 51 O.L.R. 130, it was held by this Court that indemnity could not be obtained under an insurance policy against loss caused by negligent acts, in breach of a statute, which amounted to or resulted in a crime. This case has been criticised by Mr. Justice Roche in *James v. British General Insurance Co.*, [1927] 2 K.B. 311, at p. 324; but we are bound by our own decision, recognised as it was on this point by this Court in *Sowards v. London Guarantee and Accident Co.* (1922), 52 O.L.R. 39. In the English case the decision in *Burrows v. Rhodes*, [1899] 1 Q.B. 816, 828, by a Divisional Court consisting of Kennedy and Grantham, JJ., is stated by Roche, J. ([1927] 2 K.B. at p. 323) to have laid down the rule as to indemnity against unlawful acts in this way, namely, that "the plaintiff had a right to indemnity from the defendant, or damages, which was the effective remedy, on the ground that, although the plaintiff might have done—as was alleged in the pleadings—that which was unlawful, yet he did not do it in circumstances which made it to him manifestly unlawful, or in which he knew it to be unlawful." I think Smith well knew that what he did was unlawful and that he cannot recover indemnity for the loss of the whisky.

The judgment will be varied by striking out the amount recoverable in respect to the loss of the whisky. If not agreed upon, the Registrar can ascertain the proper deduction. No costs.

Judgment below varied.

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June 10.

Will—Bequest to "Lawful Children" of Son—Whether Adopted Child Entitled to—Son Domiciled in Foreign State—Law of that State—Ontario Adoption Act, 1921—Effect and Application of—Repeal of.

The will of a testator, dying in 1907, contained a bequest to the "lawful children" of his son, surviving the son. The son survived the testator, and died in 1928, leaving no child born to him in lawful wedlock. But he had, in 1921, adopted a child under the laws of a foreign State where he was domiciled. By the laws of that State, the child upon adoption became the child and legal heir of the son and entitled to all the rights and privileges and subject to

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Held, that the child was not, under the laws of Ontario applicable to the interpretation of the will, the son's "lawful child."

The expression "lawful children" means no more than the word "children" alone.

In re Donald, Baldwin v. Mooney, [1929] S.C.R. 306, applied and followed.

As a general rule, the word "children" in a will is construed as meaning legitimate children only.

The Ontario Adoption Act, 1921, 11 Geo. V. ch. 55, was wholly repealed in 1927 by 17 Geo. V. ch. 53; and any status acquired by the child by virtue of the adoption order, recognised by Ontario law, was lost as a result of the repealing Act, because the son was still alive in 1927, and the gift was to lawful children surviving him.

And, apart from that, there was nothing in the Act to justify the argument that the child's adopted status in the foreign State entitled her to recognition as a lawful child of the son in Ontario, within the meaning of the will.

MOTION by the executors and trustees appointed by the will of Rufus Skinner, deceased, for an order determining a question as to the meaning and effect of the will.

May 23. The motion was heard by ORDE, J.A., in the Weekly Court, Toronto.

K. S. Murton, for the applicants.

Shirley Denison, K.C., for Hazel Foxall.

Gordon Waldron, K.C., for the residuary beneficiaries other than the infant.

McGregor Young, K.C., Official Guardian, for an infant residuary beneficiary.

June 10. ORDE, J.A.:—This motion raises a somewhat novel and interesting point.

By his last will, made on the 29th November, 1904, the late Rufus Skinner directed his executors and trustees to set apart a certain sum of money out of his estate and to pay the income or proceeds thereof to his son Samuel Sinclair Skinner during his natural life, "and after his decease leaving lawful children surviving him," to pay such income in the trustees' discretion for the maintenance of "his lawful children (if any) until the youngest of said children shall attain the age of 21 years," and then to pay the capital and accrued income "to the lawful children of my said son then living, equally, share and share alike, but in case my said son dies without leaving lawful children surviving him then said sum so set apart shall become part of the residue of my estate." The residue of the estate is also to be set apart for the benefit of the testator's four children, of whom

Samuel was one, equally, and subject to the same trusts, etc., as the respective sums thereinbefore directed to be set apart.

By a first codicil, dated the 24th November, 1906, the testator devised and bequeathed certain lands in Toronto, together with the household furniture, etc., therein to his son Samuel for life and after his death "to his children in equal shares." A second codicil, made in May, 1907, contains no provisions touching the question raised on this motion.

Rufus Skinner died on the 13th June, 1907. Samuel Sinclair Skinner, his son, survived him and died at Cleveland, Ohio, on the 14th December, 1928. At his death he left surviving him no "lawful child," as we understand that term in Ontario, namely a child born to him in lawful wedlock. But he had, in 1921, adopted a child under the laws of the State of Ohio, who is the Hazel Foxall above mentioned, and who now claims to be the surviving "lawful child" of Samuel Skinner within the meaning of the will of Rufus Skinner, and as such to be entitled to the benefits intended by the testator to be conferred upon Samuel Skinner's children.

Some time prior to the making of the adoption order, Hazel's lawful mother went to the State of Ohio and procured a divorce from her husband. The mother afterwards married Samuel Skinner in the State of Ohio, where Samuel appears to have acquired a domicile.

By an order made by the Probate Court, in Cuyahoga county, in the State of Ohio, on the 4th April, 1921, it was "ordered and decreed that from this date henceforth, the said child, Hazel Howard, shall be and is, to all legal intents and purposes, the child and legal heir of the petitioner, Samuel Sinclair Skinner, and as such is entitled to all of the rights and privileges and is subject to all the obligations of a child of said person begotten in lawful wedlock; and it is further ordered that the name of the said child shall be and is hereby changed from Hazel Howard to Hazel Skinner, as prayed for."

It was agreed between the solicitors for the adult residuary beneficiaries and the solicitors for Hazel Howard or Skinner (who by marriage is now Hazel Foxall), by a memorandum in writing, that "the statute law of the State of Ohio pertinent to the issue herein" on the 4th April, 1921, was section 8030 of the General Laws of the State of Ohio, which reads as follows:—

"Section 8030. The natural parents, except when such child is adopted under the provisions of sections 826 and 827, by such order shall be divested of all legal rights and obligations in respect to the child and it be free from all legal obligations of

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obedience and maintenance in respect to them. Such child shall be the child and legal heir of the person so adopting him or her, entitled to all the rights and privileges and subject to all the obligations of a child of such person begotten in lawful wedlock. But, on the decease of such person and the subsequent decease of such adopted child without issue, the property of such adopting parent shall descend to his or her next of kin, and not to the next of kin of such adopted child."

It was further agreed by the memorandum that on the 4th April, 1921, and now, by judicial construction of the above statute, the law of Ohio is that an adopted child was and is incapable of inheriting property expressly limited to the heirs of the body of the adopting parent or parents; and also that when a settlor by his will or other document indicates that an adopted child is to be treated as a child or lawful child or heir of the body of the adopter, the statute will not avail to deprive the adopted child of the benefit of the settlor's intention.

It was also agreed that the statute law and the reported judicial decisions of the State of Ohio might be read as expressing the law of that State.

Counsel for Hazel Foxall based his argument on her behalf upon two grounds. The first was that, as by the law of Ohio as expressed in the statute above quoted she had become "the child and legal heir" of Samuel Skinner and "entitled to all the rights and privileges and subject to all the obligations of a child" of his "begotten in lawful wedlock," she must be deemed to be Samuel's "lawful child" under the terms of the will.

To support this contention it was of course necessary for him to distinguish this case from that recently decided in the Supreme Court of Canada, *In re Donald, Baldwin v. Mooney*, [1929] S.C.R. 306. That case arose in Saskatchewan, and involved the question whether or not a child adopted under the laws of the State of Washington (which in this respect are almost identical with those of Ohio) was entitled under a testamentary gift to "children." The Supreme Court of Canada held that the word "children" under the law of Saskatchewan, as it stood at the time in question, did not include an adopted child and that the child adopted in the State of Washington did not take under the will.

But Mr. Denison argues that the words "lawful children" have a wider meaning than the mere word "children," and that a child of some other person formally adopted in Ohio under the provisions of the statute above quoted becomes the "lawful child" in Ohio of the person who so adopts the child, that person being domiciled in that State; and that in such circumstances the adopt-

ed child is a "lawful child" within the meaning of the words "lawful children" in the will in question, and that the reasoning of the Supreme Court judgment does not apply.

It is of course obvious that sec. 8030 of the Ohio State Law cannot of itself confer upon a child adopted thereunder any rights outside that State. Any effect which the statute giving to such child the status of "the child and legal heir" of the adopter may have in any other country must depend upon the laws of that country. Here the sole question is whether or not under the laws of this Province applicable to the interpretation of this will the words "lawful children" as used by the testator can be properly construed as including a child having the adopted status possessed by Hazel Foxall.

As a general rule, the word "child" or "children" in a will is construed as meaning legitimate children only, unless there is something on the face of the will or in the surrounding circumstances to shew that the testator by "children" meant illegitimate children; and this rule applies even where the person whose children were to be benefited had at the date of the will only illegitimate children and at the testator's death there was no possibility of any others. See Theobald on Wills, 8th ed., p. 314, and Dicey on Conflict of Laws, 4th ed., pp. 765 and 766, and p. 903, note (u).

In the interpretation of testamentary instruments there is ordinarily no real distinction between the meaning of the word "children" and that of the words "lawful children;" they are presumably intended to mean the same thing, namely, children born in lawful wedlock. The Courts have, however, in recent years, recognised the status of a child born out of wedlock, but legitimatized in some foreign jurisdiction by the subsequent marriage of its parents, as being for the purposes of English law a legitimate child of its natural father and mother and so one of the next of kin of its father's sister upon an intestacy (*In re Goodman's Trusts* (1881), 17 Ch. D. 266), and entitled to benefit under a bequest to the "sons" of its father (*In re Andros* (1883), 24 Ch. D. 637), and also as a devisee of realty. (*In re Grey's Trusts*, [1892] 3 Ch. 88).

In neither of the last two cases above mentioned was the effect of the word "lawful" as added to the word "children" involved. It would probably have had no effect upon the reasoning of those decisions, as "lawful" would be an apt word to apply to a child legitimatized by the marriage of its natural parents.

But I am quite unable to agree with the contention that the testator by adding the word "lawful" intended to give the word "children" a more extended meaning than its ordinary one.

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Orde, J.A. If it has any meaning at all, and is not in its legal sense a mere redundancy, then its effect is restrictive. I am satisfied that as a general rule when a testator speaks of lawful children he fears—quite unnecessarily—that the word “children” alone might be held to include illegitimate children, and he is anxious to make sure that none but those born in lawful wedlock shall benefit:

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If therefore it be held that the expression “lawful children” means, as I hold it does, no more than the word “children” alone, then the judgment in the *Donald* case, *supra*, is binding, and a child adopted under the laws of Ohio cannot be deemed to have been intended by the testator as a “lawful child” of Samuel Skinner.

It is not to be overlooked that, even under the Ohio statute, an adopted child is not deemed to be the child of the person adopting it for all purposes. Its rights are restricted to the adopting person, and it is not deemed to have any inheritable blood of the adopting person through which the latter’s property can descend to the child’s next of kin. There is in fact a wide gulf between an adopted child and a child legitimated by the subsequent marriage of its parents. In the latter case the child is in fact the real or natural child of the father and mother whose subsequent marriage legitimates it. Such a child may quite properly and without violence to the will of a testator be deemed to be within his intention to benefit the “children” or “lawful children” of one or other of its real and natural parents. But an adopted child is in no real sense the child of the adopting person at all. In fact under the Ohio law it is possible that a child may be adopted by a bachelor or a spinster, and there might be the anomaly of a gift to “lawful children” taking effect to the so-called “child” of an unmarried person. It is not conceivable that the testator here could have contemplated any such thing. As a matter of construction I am of the opinion that the gift to Samuel Skinner’s lawful children can take effect only in favour of children either begotten by himself in lawful wedlock or subsequently legitimated according to the law of his and their domicile by his marriage with their mother.

Mr. Denison also relied upon certain provisions of the Ontario Adoption Act, 1921, 11 Geo. V. ch. 55, and argued that Hazel Foxall, having been adopted in Ohio prior to the passage of that Act, became entitled thereunder to the benefits conferred upon Samuel Skinner’s lawful children by the will in question. This Act was wholly repealed in 1927, by 17 Geo. V. ch. 53, and I should think, if it were necessary to decide the case upon that point alone, that any status acquired by Hazel by virtue of the adoption order, recognised by Ontario law, was again lost as a result of the repeal-

ing Act, because Samuel Skinner was still alive in 1927, and the gift is to lawful children surviving him. If Hazel's status depended upon the Ontario statute of 1921 for its recognition in Ontario, then it was lost when that statute was repealed before her rights under the will could accrue.

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But, quite apart from this, there is nothing in the Act of 1921 to justify the argument that Hazel's adopted status in Ohio entitled her to any recognition as a lawful child of Samuel Skinner in Ontario, within the meaning of the will. Section 12 declared that "the word 'child' or its equivalent in any instrument shall include an adopted child unless the contrary plainly appears by the terms of the instrument." But the Act was dealing with the formal adoption of children in Ontario by application to a Judge, and the words "adopted child" in sec. 12 could mean only a child adopted in Ontario and not one adopted under some other jurisdiction. Section 13 conferred rights of succession to property in this Province to persons adopted under the laws of any other Province of Canada. This section does not help, and if it has any effect it would indicate that in all other respects the provisions of the Act applied to children adopted under it and no more.

For these reasons, I am of the opinion that Hazel Foxall is not a lawful child of Samuel Skinner and is not entitled to any benefit under any of the provisions of the will and codicil in favour of his children or of his lawful children.

As to the costs, to order the costs of all parties to be paid out of the estate would be to make the successful parties pay the costs of the unsuccessful one. The matter in dispute does not arise out of any ambiguity in the testator's will. Hazel Foxall will therefore pay her own costs, but I do not order any costs against her. The costs of the trustees and executors, as between solicitor and client, and those of the residuary beneficiaries and of the Official Guardian, will be paid out of the estate.

[APPELLATE DIVISION.]

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Judgment—Joint and Several Liability of Judgment Debtors—Payment Made by one in Satisfaction of his Indebtedness—Acceptance by Judgment Creditor — Unqualified Release of others — Reservation of Rights—Whether Implied—Intention—Satisfaction of "Proportionate Share."

June 13.

Judgments recovered by the plaintiff and another against eleven defendants were assigned to a company. These judgments remaining unpaid, T., one of the defendants, under a compromise agreement arrived at in 1925 after negotiations with the company, paid

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to the company a sum which he contended was paid to and accepted by the company in full satisfaction of his indebtedness. Originally all the defendants were jointly and severally liable in respect of the judgment debts. After the agreement was made, the company sought to examine the defendant W. as a judgment debtor:—
Held, by the majority of the Court, upon the correspondence and other evidence, that the effect of the agreement was to release T. unqualifiedly in respect of the two judgments and to release his co-defendants also; and therefore W. was not examinable as a judgment debtor.

When money or negotiable securities are given by a debtor to his creditor, the question upon what terms they are given is one of fact, depending on the intention of the parties, the presumption being that they are given by way of payment.

The correspondence shewed that the payments offered by T. were in satisfaction of his entire liability in respect of the two judgments; and, upon acceptance of that offer, it was not open to the judgment creditor to reserve rights which would entitle T.'s co-debtors to call upon him for contribution.

The acceptance of T.'s offer entitling him to an unqualified release, there was no ground for implying a reservation of rights.

In re E.W.A., [1901] 2 K.B. 642, referred to.

A subsequent agreement (January, 1927) between T. and the company to the effect that the company would not proceed further against T., but reserved all rights against the other defendants, did not and could not revive an old or create a new liability on their part.

Hammond v. Schofield, [1891] 1 Q.B. 453, referred to.

Per MAGEE, J.A., dissenting:—There was never any intention by either party to the agreement of 1925 that there should be accord and satisfaction of the judgments. The intention was that there should be satisfaction of T.'s proportionate share of what the company wanted; and the agreement of January, 1927, carried out that intention.

AN appeal by the defendant Weppler from an order of ROSE, J., directing that the appellant attend at his own expense for examination as a judgment debtor, answer all proper questions, and pay the costs of the motion to compel his attendance.

May 21. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and GRANT, JJ.A.

I. F. Hellmuth, K.C., and *S. J. Birnbaum*, for the appellant. The fact that a full settlement was made with the defendant Taylor and cash and promissory notes received from Taylor for his indebtedness has the effect of releasing the appellant, a joint debtor. Mercantile Law Amendment Act, R.S.O. 1927, ch. 161; *Nicholson v. Revill* (1836), 4 A. & E. 675, at p. 683. The learned Judge (Rose, J.) erred in holding that Taylor's release depended on the payment of the notes given. The original cause of action disappeared upon the acceptance of the notes. Upon the documents these notes were taken in satisfaction. The only remedy upon non-payment was to sue upon those notes. Taylor could have enforced

specific performance of the agreement for release before the notes were paid: *Loomer v. Marks* (1853), 11 U.C.R. 16; *Port Darlington Harbour Co. v. Squair* (1859), 8 U.C.R. 533; *In re E.W.A.*, [1901] 2 K.B. 642. The learned Judge also erred in holding that there was any reservation of rights against the other debtors in the settlement arrived at. Every note was in fact paid and Taylor rendered free from any further liability under the judgment. The judgment creditors cannot at a later date, after knowledge of the position taken, vary by consent the original agreement to the prejudice of a third party, as was endeavoured to be done by the document which Taylor was persuaded to sign. This is the case even although the effect of the original agreement, i.e., an absolute release, was not intended to be such: *Mercantile Bank of Sydney v. Taylor*, [1893] A.C. 317; *Hammond v. Schofield*, [1891] 1 Q.B. 453.

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J. R. Cartwright, for the Land Securities Company of Canada Ltd., assignee of the plaintiff's judgment, respondent. The learned Judge was right in holding that the original agreement was an executory one to give a release to Taylor upon payment of the notes being made by him, and that it could have been changed before completion, as in fact it was, by a new agreement under seal, upon consideration being given to Taylor. This agreement, being under seal, must be taken as the final agreement between the parties, unless fraud be proved. It merges all previous documents and correspondence, which should not now be looked at: Halsbury's Laws of England, vol. 10, p. 444, para. 782; *In re E.W.A.*, *supra*. The learned Judge was also right in holding that the correspondence, on its face, contained, apart from the letter of the 3rd July, a reservation of rights against the other debtors, and released only Taylor. It is proper to look at the letters both before and after the letter of the 3rd July, because that was only one of a series of negotiations leading up to the final document under seal. From such correspondence it appears that a reservation was contemplated by the creditor, and such was within the knowledge of the debtor. The appellant had no rights in the dealings between Taylor and the respondent. All the documents bearing on the negotiations should be looked at; and the Court should seek out the intention of the parties. It does not seem credible that either party should have contemplated the taking of the notes as a complete extinguishment against all parties of a judgment which was then unsatisfied to the extent of \$77,000. The learned Judge was right in giving effect to the manifest intention of the parties.

June 13. MULOCK, C.J.O.:—The plaintiff recovered a judgment against the defendants, and the Western Canada Realty

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Company also obtained a judgment against the same defendants, and both judgments were assigned to the Land Securities Company Limited, hereinafter referred to as the company.

These judgments remaining unpaid, John Taylor, one of the defendants, entered into correspondence with the company with a view to compromising his indebtedness under the judgments and being thereby relieved from all further liability, and as a result of such negotiations he paid to the company in cash and notes an agreed-upon sum which he contends was paid to and accepted by the company in full satisfaction of his indebtedness. Later the company endeavoured to examine the defendant Weppler as a judgment debtor in respect of these judgments, but he, contending that the effect of the arrangement come to between Taylor and the company was to discharge him (Weppler), a joint debtor, from liability, declined to undergo examination, whereupon a motion was made before Rose, J., for an order committing Weppler for contempt.

The Judge held that the settlement effected between Taylor and the company did not relieve Weppler from liability, and ordered him to attend for examination as a judgment debtor. From this order Weppler appeals.

It was conceded during the argument that originally all the defendants were jointly and severally liable in respect of the said judgment debts, and the question to be determined is whether the acceptance by the company of the offer of the defendant Taylor entitled him to an unqualified or a qualified release in respect of the two judgments. If to an unqualified release, then his co-defendants also became released, and Weppler ceased to be a judgment debtor, and therefore was not subject to examination as such. The nature of Taylor's offer appears in the following correspondence between the company and Taylor:—

"5th May, 1925.

"John Taylor, Esq.,
"Hanover, Ont.

"Without prejudice.

"Dear Sir: *Re Western Canada Realty Corporation Limited.*

"We are informed by Mr. John McEachren, who, we understand, endeavoured to negotiate a settlement of the amount owing by you and others under a judgment held by us, that you have withdrawn the tentative offer of settlement made when Mr. McEachren was in Toronto.

"We intend to commence strenuous action to collect the amount of the judgment held by us, but, before requesting our solicitors to proceed in the matter, we shall be glad to know if you wish to make some offer of settlement of the amount of your indebtedness in this connection. We shall expect to hear from you by the 16th instant.

"Yours faithfully,
"G. O. Vale,
"For manager."

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"Hanover, Ont., May 12th, 1925.

"The Land Securities Co. of Canada Ltd.,

"436 Main Street, Winnipeg, Man.

"Attention G. O. Vale. Without prejudice.

"Dear Sir: Re Western Canada Realty Corporation.

"I have your letter of the 5th instant in regard to the above and would say that I met Mr. McEachren last fall and made an offer which I understood at the time would be acceptable, but later Mr. McEachren informed me that that would not be a final settlement, that if they did not obtain the amount from the other guarantors to come up to the amount they desired to have, that they would necessarily have to ask for a further contribution and if that were not sufficient a further contribution.

"You can quite readily understand that I could not accept any arrangement of that kind and had therefore to withdraw my previous offer. Whatever amount would be required from me I would like it to be a final settlement, as I told Mr. McEachren that I did not have the money but will have to earn it first. I could not afford to have this matter go on indefinitely.

"Trusting the above shews you clearly what I desired, I am,
"Yours truly,
"John Taylor."

"18th May, 1925.

"John Taylor, Esq.,

"Hanover, Ont.

"Without prejudice.

"Dear Sir: Re Western Canada Realty Corporation.

"Referring to your letter of the 12th instant, we shall be glad to know if you are prepared to renew your offer of \$2,500.00, payable \$500.00 cash and \$500.00 every six months with interest at 6% per annum, in settlement of the judgment we hold against you. If you are prepared to renew that offer and will forward us \$500.00

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cash; subject to approval by our board, we are prepared to accept that amount in settlement of your liability, provided we receive payment of \$500.00 by the 31st instant. If payment is not made by that date, we intend to instruct our solicitors to take action and endeavour to collect the amount owing by you.

“Yours faithfully,

“G. O. Vale,

“For manager.”

“Hanover, Ont., May 27th, 1925.

“The Land Securities Co. of Canada Ltd.,
“136 Main St.,
“Winnipeg, Man.

“Attention Mr. G. O. Vale. Without prejudice.

“Dear Sir: Re Western Canada Realty.

“Your letter of the 18th inst. received and in regard to offer made Mr. McEachren last fall, in regard to settlement of the judgments you hold against me, would say at the time I made Mr. McEachren this offer of \$2,500 in full of my proportionate share as guarantor, I thought I would be able to carry out the proposition of \$500.00 cash and \$500.00 every six months.

“I find however that this is going to be a pretty hard strain on me to meet these payments, but I also feel that it is rather foolish to waste on law costs and diminish what assets I now have that might as well be applied to a settlement.

“I am still of the opinion that I had better renew the offer as stated before, but would like a stipulation that in the event of sickness either of myself or family, that this claim will not be unduly pushed. I also think that these payments should not all carry 6% interest. I would say that the first two at least should be without interest, which would require me to raise \$1,500.00 in one year, which I am afraid is a pretty large undertaking, and to have interest on top of this means too much to carry along with my ordinary business requirements. If you will make these payments of \$500.00 cash and \$500.00 every six months without interest, and, if you cannot agree to that, leave the last two payments bearing interest, I will try and undertake to carry this out. I presume as suggested by Mr. McEachren last fall that this will be done through the Bank of Montreal, Hanover branch.

“Awaiting your reply, I am,

“Yours truly,

“John Taylor.”

"4th June, 1925.

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"John Taylor, Esq.,
"Hanover, Ontario.

"Without prejudice.

"Dear Sir: *Re Western Canada Realty Corporation.*

"Referring to your letter of the 27th ultimo, we note you are prepared to pay \$1,500, payable \$500.00 cash and \$500.00 every six months thereafter, with interest at the rate of 6% per annum from the 1st June, 1926, in settlement of your indebtedness to us in respect of the judgments we hold against you.

"We shall be obliged if you will kindly forward us a remittance for \$500.00, being the cash payment in this connection, and we will submit your offer to our board with our recommendation for acceptance.

"It is understood that if you forward us a remittance of \$500.00 and your offer is not accepted by our board we will return that amount to you.

"We shall be obliged if you will give this matter your early attention.

"Yours faithfully,

"G. O. Vale,

"For manager."

"Hanover, Ont., June 15th, 1925.

"The Land Securities Co. of Canada,
"436 Main St.,
"Winnipeg, Man.

"Attention G. O. Vale. Without prejudice.

"Dear Sir: Further reference to your letter of the 4th of June, would say that we are enclosing herewith certified cheque of \$500.00, note Dec. 1st, 1925, \$500.00, note June 1st, 1926, \$500.00, note Dec. 1st, 1926, \$500.00, with interest at 6%, to complete offer made Mr. McEachren last fall.

"In your letter you say \$1,500.00, but we judge this was a typographical error, as the amount was to be \$2,500.00.

"It is understood that if this offer is not accepted by your board you will return both cheque and notes.

"Sorry I could not attend to this a few days earlier.

"Yours truly,

"John Taylor."

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“Without prejudice.

“Dear Sir: *Re Western Canada Realty Corporation.*

“We beg to acknowledge receipt of your letter of the 15th instant, with the enclosures as therein mentioned, in connection with your offer of settlement of the judgment we hold against you and others.

“We will hold the cheque for \$500.00 and the notes in trust, and if your offer is not approved by our board, we will return the cheque and notes to you.

“The amount which we are prepared to accept is \$2,500.00 and our letter of the 4th instant, where we mentioned only \$1,500.00, was in error. We thank you for calling our attention to this mistake, and we regret any inconvenience you may have been caused.

“We will communicate with you again in this connection, in due course.

“Yours faithfully,

“G. O. Vale,

“For manager.”

“3rd July, 1925.

“John Taylor, Esq.,
“Hanover, Ontario.

“Dear Sir: *Re Western Canada Realty Corporation Limited.*

“Referring to our letter of the 20th ultimo and previous correspondence, we are prepared to accept \$2,500.00 from you in full settlement of your indebtedness in respect of the judgment we hold against you and others, payable as follows:—

“\$500.00 cash.

“\$500.00 1st December, 1925.

“\$500.00 1st June, 1926.

“\$500.00 1st December, 1926, with interest at 6% per annum from the 15th ultimo.

“\$500.00 1st June, 1927, with interest at 6% per annum from the 15th ultimo.

“We have therefore negotiated your cheque for \$500.00, being the cash payment in accordance with the above terms of settlement.

"We shall be glad if you will remit direct to this company when making payments in respect of your notes. If all your notes are paid promptly on due dates, we are prepared to waive the interest called for on the notes due 1st December, 1926, and 1st June, 1927.

"Yours faithfully,

"C. B. McNair,

"For manager."

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The first reference in this correspondence to an offer by Taylor appears in the company's letter of the 5th May, 1925, to Taylor, wherein the company states that it understands from John McEachren that he, Taylor, had "withdrawn the tentative offer of settlement made when Mr. McEachren was in Toronto;" and the letter concludes with a suggestion to Taylor to "make some offer of settlement of your indebtedness," etc. In answer to this overture Taylor by letter of the 12th May, 1925, to the company, stated in substance that his reason for withdrawing his offer made through McEachren was that he had learned from the latter that the company would not accept it in full satisfaction of its claim against him, but only subject to the right of the company to require further payments by Taylor should the other defendants not pay the amounts to be required of them by the company—Taylor in this letter adding, "You can quite readily understand that I could not accept any arrangement of that kind and had therefore to withdraw my previous offer; whatever amount would be required from me I would like it to be a final settlement." In answer to this letter the company's manager by letter of the 18th May, 1925, wrote Taylor asking him (not to make a new or different offer but) to "renew your offer of \$2,500," payable, etc.; adding that if he would do so and send \$500 cash, "subject to the approval of the board we are prepared to accept that amount in settlement of your liability." In Taylor's letter of the 27th May, acknowledging the receipt of the manager's letter of the 18th May, is this passage, "At the time I made Mr. McEachren this offer of \$2,500 in full of my proportionate share as guarantor," and he adds, "I am still of the opinion that I had better renew the offer as stated above." In the company manager's letter of the 4th June, in answer to that of Taylor of the 27th May, the manager says; "We note you are prepared to pay \$2,500 payable \$500 cash," etc., "in settlement of your indebtedness to us in respect of the judgments we hold against you," and he adds that if Taylor will send the cash payment of \$500 the offer will be submitted to the board, and if the offer is not accepted the board will return the \$500. Thereupon Taylor on the 15th June sent

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to the company a marked cheque for the cash payment of \$500 and the agreed-upon notes for the balance of the \$2,500, "to complete offer made Mr. McEachren last fall. It is understood that if this offer is not accepted by your board you will return both cheque and notes;" and by letter of the 30th June to Taylor the company's manager acknowledges receipt of the marked cheque and notes "in connection with your offer of settlement of the judgment held against you," and adds, "We will hold the cheque for \$500 and the notes in trust, and if your offer is not approved by our board we will return the cheque and notes to you." The company cashed the cheque and retained the notes.

Such conduct on its part was, in my opinion, an unqualified acceptance of Taylor's offer; and, whilst the company's letter of the 3rd July was an admission of acceptance, it did not, in my opinion, constitute acceptance, and the rights of the two parties depend upon the nature of Taylor's offer accepted in manner above stated.

When money or negotiable securities are given by a debtor to his creditor, the question upon what terms they are given is one of fact depending on the intention of the parties, the presumption being that they are given by way of payment: Halsbury's Laws of England, vol. 7, para. 914, and cases there referred to.

It is clear from the correspondence that the meaning of Taylor's offer was that acceptance of his cheque and notes was to operate in full satisfaction of his indebtedness under the two judgments.

The correspondence shews that the payments which he was then offering to make were to extinguish his liability. The language used appears incompatible with any other understanding. In his letter of the 12th May, he explains his withdrawal of a previous offer when informed that "that would not be a final settlement," and he proceeds to state that "whatever amount will be required from me" (note the words of general import), "I would like it to be a final settlement." He gives his reason, that he would have to earn the money first, and says, "I could not afford to have this matter go on indefinitely." In the company's reply of the 18th May, after asking if Taylor would renew "his offer," the manager says: "We are prepared to accept that amount in settlement of your liability." In the light of Taylor's previous statements, this must mean his entire liability, and not that the company by pursuit of his co-guarantors should be able, indirectly, to subject him to further liability for payments of which both amount and time would be indefinite. So also the whole tenor of Taylor's letter of the 27th May, wherein he stresses the severe

strain it would be to him to get the money to implement the settlement, and begs off the interest on deferred payments, is incompatible with any other intention than that he is making this special effort to be rid of liability forever in respect of these judgments.

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But there is another important feature of this letter. He states in the first paragraph, in reference to the offer previously made to McEachren, that it was "in full of my proportionate share as guarantor," etc. If he paid his proportionate share as guarantor, then there would be no contribution to any co-guarantors. How then, if he made a settlement in full of his proportionate share, could there remain any liability or contribution which is limited by the "proportionate share so settled in full?" That he is completing the offer of settlement previously made to McEachren is made quite definite in his letter of the 15th June, enclosing the cheque and notes which the company used.

In my opinion, the correspondence shews that the payments offered by Taylor were in satisfaction of his entire liability in respect of the two judgments, and upon acceptance of that offer it was not open to the judgment creditors to reserve rights which would entitle Taylor's co-debtors to call upon him for contribution.

Accordingly, on acceptance, his indebtedness was extinguished. The learned Judge was of the opinion that the letter of the 3rd July, 1925, from the company to Taylor, constituted the acceptance and that it implied a reservation of the company's rights against Taylor's joint debtors, namely, his co-defendants.

Assuming for the purpose of argument that that letter constituted the acceptance, I am unable to find therein any implied reservation of rights against Taylor's co-debtors. Such a reservation would have destroyed the unqualified release that Taylor's offer stipulated for and would have left him liable to claims for contribution by his co-debtors: *In re E.W.A.*, [1901] 2 K.B. 642.

The acceptance of Taylor's offer entitling him to an unqualified release, in my opinion, leaves no ground for implying a reservation of rights which would have destroyed the unqualified character of the release to which Taylor became entitled.

Later there was an attempt to reserve rights by indenture of the 10th January, 1927, made between the company and Taylor, wherein it was agreed that the company would not proceed further against Taylor, but reserved all its rights against the other defendants. The acceptance of Taylor's offer, having extinguished the company's claim against him as a judgment debtor, also extinguished its claim against his joint debtors, and it was not com-

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petent for him, or the company, by any agreement, to revive an old or create a new liability on their part: *Hammond v. Schofield*, [1891] 1 Q.B. 453.

For this reason I deem it unnecessary to consider any of the correspondence subsequent to the acceptance by the company of the cheque and notes. The effect of the acceptance of Taylor's offer being to extinguish the company's claim against him, his co-defendants also are relieved of liability, and the order appealed from should be set aside with costs here and below.

HODGINS and GRANT, JJ.A., agreed with MULOCK, C.J.O.

MAGEE, J.A.:—The questions arising on this appeal come before the Court in a very unsatisfactory way, involving as they do a very large amount of money and raised only on an interlocutory proceeding in which meagre evidence is offered.

On the 15th December, 1919, the plaintiff Lugsdin recovered judgment by default against the defendant Ball and ten others, including John Taylor and Daniel Weppler, for \$77,743.87 and costs. That judgment was assigned by Lugsdin to the Land Securities Company of Canada Limited. Only \$15,604.29 have been paid on account of that and another judgment recovered by the Western Canada Realty Corporation, and also assigned to the same company, against some of the same defendants.

The defendant Weppler has paid nothing on the judgment in this action. The company sought to examine Weppler as a judgment debtor in order to ascertain what property he has. He refused to be examined, and appeals from the order of Mr. Justice Rose directing him to attend for examination. He does so upon the ground that the company has released his co-defendant Taylor from the judgment and that thereby he also is released.

The evidence as to the dealings between Taylor and the company is only documentary. My Lord the Chief Justice has quoted the letters of 5th, 12th, 18th, and 27th May, 1925, and 4th, 15th, and 30th June, and 3rd July, 1925.

There were some other letters. On the 22nd August, 1925, Taylor wrote to the company:—

"I understood at the time of the Ball trial at Owen Sound that your company were holding both the Standard Trust (Lugsdin) judgment and the Western Realty judgment, and again at Toronto, where I met Mr. McEachren, I had the same impression. I would like to know for sure that both these judgments were included in the settlement or only one. I have been telling Mr. Weppler that both are included, but he seems to think differently. Kindly let me know, therefore, if I am right or not."

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To this the company replied on the 28th August as follows:—

"The settlement we have arranged with yourself and others and are endeavouring to arrange with Mr. Weppler includes both the Western Canada Realty judgment and the Standard Trust Company (Lugsdin) judgment, which was assigned to this company."

On the 21st November, 1925, the company wrote Taylor: "Referring to our previous correspondence in connection with the arrangements for settlement of the judgment we hold against yourself and others, in so far as it affects you, we beg to remind you that one of your notes for \$500.00, given in respect of the settlement, falls due on the 1st proximo."

On the 28th November, Taylor sent cheque for \$500.00 to retire note due on the 1st December, and on the 3rd December the company wrote acknowledging receipt "in payment of your note . . . in connection with the arrangement for settlement of the judgment we hold against yourself and others in so far as it affects you."

On the 19th May, 1926, the company wrote Taylor reminding him of note coming due on the 1st June in the same terms as the letter of the 21st November, 1925, and Taylor sent a cheque on the 27th May, and the company on the 2nd June replied in the same terms as on the 3rd December, 1925.

On the 30th November, 1926, Taylor sent a cheque for \$500 in payment of his note due on the 1st December, and on the 5th January, 1927, he wrote asking acknowledgment, and on the 26th January the company sent him the note cancelled.

On the 22nd February and again on the 13th May, 1927, the company wrote Taylor offering to accept \$450 in settlement of the last note of \$500 due on the 1st June, if paid promptly. On the 14th May Taylor wrote the company's solicitors that on account of sickness of Mrs. Taylor and expense he was not sure he could meet the \$450 on the 1st June, and he added: "When your man was here in January he seemed to indicate that there was a probability of this note being forgiven entirely in view of the settlements effected with others. We would very much appreciate if you could make some further discount." On the 1st June he sent them his cheque for \$450.

In the meantime, in January, 1927, according to the affidavit of the company's manager, Taylor had executed the indenture made between them dated the 10th January, 1927, referred to by my Lord, in which, after reciting that Taylor had paid \$2,500 on account of the two judgments, the company agreed with Taylor that it "will not proceed further against" him under the said

App. Div. judgments, "provided however and it is expressly agreed" that it
1929. "reserves all its rights against all the other parties indebted" under
LUGSDIN the judgments. A duplicate of the indenture was left with Taylor.
v. Taylor then gave up the company's letter of the 3rd July, 1925.
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Magee, J.A. Taylor makes affidavit that in 1925 "negotiations with reference to the settlement of the said judgments were in progress" between himself and the company and resulted, in July, 1925, "in the full settlement" of his indebtedness in respect of the judgments, and that in January, 1927, he was asked to sign the settlement agreement and was told it was in accordance with the letters which had passed, and he says that, had he known it had a legal effect different from the settlement made in July, 1925, "in all probability" he would never have signed it, and he has no recollection of ever giving up the letter of the 3rd July, 1925..

It is not stated when or in what amounts or from what source the company received the \$15,604.29; but, when the appellant attended on the appointment for his examination and refused to be examined, counsel for the plaintiff stated that the company had received payments from four defendants—Hall, Pepler, Taylor, and Yager—but it does not appear when they made the payments nor whether before or after July, 1925. Counsel for the appellant at that appointment stated that the position he had been taking ever since 1925, and since the company settled with Taylor, was that Weppeler was released.

It is, I think, clear from the correspondence that the company never had any idea of abandoning its rights against the other judgment debtors. The letter of the 22nd May, 1925, is very clear that McEachren had told Taylor not only that the company intended to collect from the other defendants, but also that it would not be a final settlement with the company even as to Taylor himself; for, if they did not get enough from the others, they would necessarily have to ask more and even more from him—and it was to this that Taylor objected. Then Taylor's letter of the 27th May, 1925, shews he understood he was only settling his "proportionate share," and had thought he would be able to carry it out—and in that letter he was still of the opinion that he had better renew the offer as stated before.

Then his letter of the 15th June encloses cheque and notes "to complete offer made Mr. McEachren last fall." Surely that was the offer of his proportionate share and with the right to the company to look to the others. Then the letter of the 3rd July, 1925, expressly refers to the "previous correspondence;" and, though it uses the words "full settlement of your indebtedness," it says in respect of the judgment "against you and others." His letter of

the 22nd August, 1925, shews that for some reason he and Weppler were discussing the matter—whether the company was then pressing the latter does not appear—but on the 28th August the company writes that the settlement arranged with Taylor and others, and which it is endeavouring to arrange with Mr. Weppler, includes both judgments.

Subsequent letters of the company speak of the settlement of the judgment “so far as it affects you.”

There was never any intention by either party that there would be any accord and satisfaction of the judgments, but only of Taylor’s “proportionate share” of what the company wanted, and the formal document of the 10th January, 1927, carried out that intention, and Taylor executed it and kept his duplicate, which stated plainly that the company reserved its rights against others. His affidavit that in all probability he would have objected to it if it differed from the arrangement made is very unsatisfactory.

I would dismiss the appeal.

Appeal allowed (MAGEE, J.A., dissenting).

[APPELLATE DIVISION.]

RE WALLACE REALTY CO. AND CITY OF OTTAWA.

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Assessment and Taxes — Income Assessment of Trading Company — Proper Deductions from Gross Income — Revenue Derived from Dividends of another Company — Money Received by that Company from Rentals of Real Property — “Overhead Expenses” — Method of Fixing — Interest Paid on Moneys Borrowed for Purpose of Acquiring Shares and Bonds of another Company — “Carrying Charges” — Assessment Act, R.S.O. 1927, ch. 238, sec. 1 (e).

A joint stock trading company, being assessed for income by a city corporation, was held, upon a case stated by a County Court Judge, to have no right to deduct from its gross receipts a sum received from a building company for dividends upon shares of the building company owned by the trading company.

The profits from which the dividends were paid by the building company, though derived from rentals of real property, and therefore not subject to assessment as income of the building company, were not received by the trading company as rentals.

2. The amount of the allowance for “overhead expenses” should be fixed and determined in the proportion which the amount of non-taxable income bears to total gross income.
3. The trading company, having power under its charter to acquire, hold, and sell the bonds and shares of other incorporated companies, purchased shares and bonds of the A. company; and, to finance the purchase, borrowed money from a bank:—

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Held (ORDE, J.A., dissenting), that, in the circumstances of this case, interest paid by the trading company to the bank upon the money borrowed should not, in fixing the amount of the trading company's assessable income, be deducted (as being expenses or "carrying charges") from the gross receipts.

Re Massey-Harris Co. Ltd. and City of Toronto (1919), 45 O.L.R. 353, applied and followed.

Per ORDE, J.A.:—The earnings of a joint stock trading company are to be determined upon a different footing from those of an individual. This trading company, legitimately engaging in the business of buying and holding bonds and shares issued by other companies, from which it derived an income, acquired securities in the course of its business; and the interest paid was a business expenditure and should be treated as such as fully as wages or any other outgoings.

Section 1 (e) of the Assessment Act, defining "income," considered. The *Massey-Harris* case, *supra*, and *Re Stout and City of Toronto* (1927), 60 O.L.R. 313, distinguished.

THE following statement is taken from the judgment of LATCHFORD, C.J.:—

Appeal by the company on the following case stated by his Honour Colin G. O'Brian on an appeal to him as County Court Judge by the Wallace Realty Company from a decision of the Court of Revision of the City of Ottawa:—

1. Was I right in holding that no part of the sum of \$8,-004.83, in respect of the interest paid by the company to the Bank of Montreal (and which I have designated as the "carrying charge") should be deducted from the gross receipts of \$27,091?

2. Was I right in overruling the appellant company's claim to deduct the revenue derived by it from the Ottawa Building Company Limited, amounting to \$6,622?

3. Was I right in holding that the amount of the allowance for so-called overhead expenses should be fixed and determined in the proportion which the amount of its non-taxable income bore to its total gross income?

4. If question 3 is answered in the negative, what amount, if any, should have been deducted for overhead expenses, so-called?

What the learned Judge held is stated in the grounds of appeal, which set forth that he erred:—

1. In holding that no part of the sum of \$8,004.83, in respect of the interest paid by the appellant to the Bank of Montreal (and which the learned Judge has designated as the "carrying charge"), should be deducted from the gross receipts of \$27,091.

2. In overruling the appellant's claim to deduct the revenue derived by it from the Ottawa Building Company Limited, amounting to \$6,622.

3. In holding that the amount of the allowance for so called overhead expenses should be fixed and determined in the proportion which the amount of its non-taxable income bore to its total gross income.

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January 7. The appeal was heard by LATCHFORD, C.J., RIDDELL, ORDE, and FISHER, JJ.A.

Redmond Quain, for the appellant company. The learned Judge erred in holding that no part of the sum of \$8,004.83 in respect of the interest paid by the appellant to the Bank of Montreal should be deducted from the gross receipts of \$27,091. "Income" in the case of an individual is determined in a different way from income in the case of a joint stock company. When a company borrows money to produce gross revenue, interest paid on this money should be deducted to arrive at the company's profits. It is income in the sense of profit which is assessable. Reference to *Re Massey-Harris Co. Ltd. and City of Toronto* (1919), 45 O.L.R. 353; *Re Stout and City of Toronto* (1927), 60 O.L.R. 313; *Lawless v. Sullivan* (1881), 6 App. Cas. 373; *In re Canada Life Assurance Co. and City of Hamilton* (1898), 25 A.R. 312; *In re McMaster Estate Assessment* (1901), 2 O.L.R. 474; *McLeod v. City of Windsor* (1922), 52 O.L.R. 562. The learned Judge erred in overruling the appellant's claim to deduct the revenue derived by it from the Ottawa Building Company Ltd., amounting to \$6,622. As the revenue of that company was derived from rentals, and was therefore exempt from income tax, the dividends paid to its shareholders were likewise exempt. The learned Judge erred in holding that the amount of the allowance for "overhead expenses" should be determined in the proportion which the amount of non-taxable income bore to total gross income. The company is entitled to charge the whole of its expenditure for "overhead" against the revenue derived from stocks and bonds.

F. B. Proctor, K.C., for the Corporation of the City of Ottawa, respondent. The first question should be answered in the affirmative, for the reasons stated by the learned Judge below in refusing the deduction of the \$8,004.83. In the determination of what is "income" there is no difference between the case of a company and of an individual. Question 2 should also be answered in the affirmative. The \$6,622 was received by the appellant company not as rent but as dividends on shares held in the building company, and so formed part of the company's assessable income. The apportionment of the "overhead expenses" made by the learned Judge below is reasonable, and the deduction of one-third is fair, and so the third question may be answered in the affirmative.

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June 26. LATCHFORD, C.J. (after stating the facts as above) :—

At the close of the arguments at bar the Court was unanimously of the opinion that questions 2 and 3 should be answered affirmatively.

As to question 3, the apportionment of overhead expenses in the ratio that the non-taxable income of the company bore to its total gross income seemed to be fair. That it is, approximately, one-third seemed to be admitted by Mr. Proctor. With a possible variation, which is a matter of computation, the question was held to be properly answered in the affirmative.

An affirmative answer was also given to question 2 on the simple ground that the \$6,622 received from the Ottawa Building Company, while derived by that company from rentals of real property, and therefore not subject to assessment as income, against the building company, was in fact received by the appellant company not as rent but as dividends on shares held in the building company by the appellant company and properly constituted part of its assessable income.

The only difficulty in this appeal arose under question 1. As to that the Court (Orde, J.A., doubting and ultimately dissenting) considered that the appeal also failed.

The Wallace Realty Company, under its supplementary charter of 1923, had power not only to carry on the ordinary business of a land corporation, but also to acquire, hold, and sell the bonds and shares of other incorporated companies. Under the latter power, it acquired, late in 1925, shares in a company called the Auditorium Limited, for which it agreed to pay \$120,000, and also bonds of the same corporation for about \$260,000. To finance the purchases the Wallace Realty Company borrowed \$360,000, from the Bank of Montreal on a promissory note, endorsed by the vendor of the shares and bonds, and doubtless otherwise secured.

It may be immaterial that in the statement of purchases filed by the Wallace Realty Company with the city's assessment department the acquisition of the shares is not mentioned.

No evidence was given of the value of the shares or bonds. What interest was made payable or had accrued on the bonds was also undisclosed. That they bore interest which was constantly accruing cannot be doubted.

The \$8,004.83 is stated in the case to be interest paid by the appellant to the bank upon the loan of \$360,000, but the learned County Court Judge, with what I regard as greater propriety, treats the sum in his reasons for judgment as what it in fact was, discount of this note and renewals thereof. He then added :—

"If the deduction (of the \$8,004.83) can be allowed, then any person who buys property of any description on credit could claim to set off the interest on the unpaid purchase-money as a carrying charge. I do not think any authority can be found for such a proposition."

Authority to the contrary was thought to be found in *Re Massey-Harris Co. Ltd. and City of Toronto*, 45 O.L.R. 353, and in *Re Stout and City of Toronto*, 60 O.L.R. 313. The latter case does not seem to me quite to apply; but I find myself unable to distinguish the decision in the *Massey-Harris* case, in which I took part, from this.

Perhaps a more analogous case than that mentioned by Judge O'Brian would be presented where a person who purchases securities and finds it necessary to discount a note in order to pay for them seeks to deduct the bank-charges from his income return regardless of any increase in the value of the securities resulting from market appreciation or from accrued interest.

What seems clear in any aspect of the appeal is that the \$8,004.83 was not proved to be a loss. It is true that the shares brought in no dividends in 1925; but the bonds must have had interest constantly accruing, which increased their value, even if nothing else did. For all that appears the purchase may have been highly profitable.

Mr. Justice Orde dissenting, the Court was and is of opinion that question 1, like questions 2 and 3, should be answered in the affirmative.

The appeal is accordingly dismissed with costs.

Mr. Justice Riddell, at the close of the argument, thought that the appeal should be dismissed but is not responsible for the reasons herein stated.

FISHER, J.A., agreed with the judgment read by LATCHFORD, C.J.

ORDE, J.A.:—This comes to us by way of a special case stated by a Judge of the County Court of the County of Carleton under sec. 84 of the Assessment Act, R.S.O. 1927, ch. 238, upon an appeal to him from the Court of Revision of the City of Ottawa.

All the questions submitted except one were really disposed of upon the argument, but it is necessary to mention them to understand the point upon which judgment was reserved.

The Wallace Realty Company Ltd. is incorporated under the Ontario Companies Act, and is expressly empowered by its charter, among other things, to carry on the business of a land company

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and to acquire, deal in, maintain, and dispose of real estate, and to acquire, hold, sell and deal in the bonds, debentures, stocks and shares, of any duly incorporated company, etc.

The company's gross income is derived from the rentals of real estate owned by it, and from the interest and dividends received from a large amount of debentures and shares which it has acquired. The income derived from rentals upon real estate is admittedly exempt from taxation under subsec. 24 of sec. 4 of the Act, but the fact that part of its income is so exempt is involved in the question as to the proper amount to be deducted for expenses.

Part of the company's gross income is derived from dividends paid upon shares of the Ottawa Building Company Limited belonging to it, and it was argued that, as the revenue of the building company was derived from rentals and was therefore exempt from income tax, the dividends paid to its shareholders were likewise exempt. The learned County Court Judge has rightly held that the dividends paid by the building company to its shareholders do not come to their hands as rent but as a distribution of the company's net profits. There is nothing in the Act to suggest that dividends so derived are entitled to exemption. To grant exemption to such dividends would in effect be giving a double exemption, one for the gross rentals received by the building company, and one for net profits when distributed to the shareholders. The second question, "Was I right in overruling the appellant company's claim to deduct the revenue derived by them from the Ottawa Building Company Limited amounting to \$6,622?" must be answered in the affirmative.

The company further contended that, notwithstanding the fact that a substantial part of its gross revenue, nearly one-third of the whole, was derived from rentals, and was therefore exempt, it was entitled to charge up the whole of its expenditure against the revenue derived from stocks and bonds, although some part of that expenditure was necessarily incurred in collecting the rentals. The learned County Court Judge has held that the expenses must be apportioned upon a rough division of the gross revenue into one-third from rentals and two-thirds from other sources, and has distributed the deductible expenditure accordingly. We were of the opinion that he was right in holding that the expenditures must be apportioned. It is obvious that the contention of the company, if it were sound, might, in a case where the gross rentals were large and the taxable revenue from other sources small in comparison, by throwing the whole cost of operation upon the taxable revenues, completely wipe them out and

leave no net income whatever to be taxed. The company ought to be permitted to charge against the gross taxable income only so much of its expenses as could reasonably be attributed to that branch of its business.

The third question, "Was I right in holding that the amount of the allowance for so-called overhead expenses should be fixed and determined in the proportion which the amount of their non-taxable income bore to their total gross income?" should therefore be answered in the affirmative. But in applying that ruling regard ought to be had to the increase in the total deductible expenditure which will result if my views as to the proper answer to the first question submitted to us should prevail.

That question is a substantial one, and is in my opinion of some importance as to what constitutes the taxable income of a joint stock company under the Assessment Act. It seems odd that the question has not, so far as I am aware, come up squarely for decision before, and I can only conclude that most municipal assessors in the past have dealt with the problem, if it be a problem at all, by assessing joint stock companies for the purpose of income tax upon a footing that was deemed to be fair by the companies themselves.

For the purpose of acquiring and holding certain debentures and shares, the company found it necessary to borrow a large sum of money from a bank, upon which it paid interest to the amount of \$8,004.83, and it claims to be entitled to include this sum among its expenses for the year and to deduct the same from the gross taxable income. This claim has been disallowed by the learned County Court Judge, and question number one is, "Was I right in holding that no part of the sum of \$8,004.83 in respect of the interest paid by them to the Bank of Montreal (and which I have designated as the "carrying charge") should be deducted from the gross receipts of \$27,091.00 ?"

In coming to the decision that the company cannot deduct this item of interest, the learned County Court Judge relies upon the judgments of this Court in *Re Massey-Harris Co. Ltd. and City of Toronto*, 45 O.L.R. 353, and *Re Stout and City of Toronto*, 60 O.L.R. 313; but, with respect, I cannot see what application either case has to the circumstances of the case now before us.

The *Massey-Harris* case was of a special character. The purchase of Government "Victory" bonds during the war was really an isolated transaction, the buying, holding, and selling of stocks and bonds not being a regular part of the company's business. The company claimed the right to deduct from the income received upon the bonds certain items which consisted of (a) the discount

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allowed by the Government for payment in cash rather than by instalments, (b) an allowance by way of "carrying charges" for interest which the company might have earned with the moneys expended in the purchase of the bonds, and (c) the loss of capital which resulted upon the resale of the bonds. This claim was wholly disallowed by the Court. Whether or not a loss of capital, which, in order to shew a proper balance-sheet to a joint stock company's creditors and shareholders, ought to be made good out of income, should also be deducted in determining its income for municipal taxation, may be a nice question in many cases, and I cannot think that the judgment in the *Massey-Harris* case is necessarily binding in every case where that question may arise. But the contention there that the other two items were deductible seems hardly arguable. There could be no real ground for allowing the company to deduct something because its investment was paid in cash rather than in instalments. So much money was paid out to purchase the bonds and the interest paid was the income derived from that investment. And it was equally futile to argue that the company ought to have been allowed to deduct from the interest it actually earned upon the money so invested something which it called "carrying charges" and which represented the interest it would have had to pay if it had been obliged to borrow the money with which to purchase the bonds. In other words, it wished to deduct a sum which it never paid because it might in certain circumstances have had to pay it. That contention has always seemed to me so extraordinary that I have never quite understood why the Court gave it so much consideration. The answer to it seems to me to be fairly obvious, namely: that if you are to be allowed to deduct the interest which you would have had to pay if you had borrowed the money to make the investment, notwithstanding that you have used your own capital for the purpose, you must carry the fiction to its logical conclusion and add a corresponding sum to the other side of your ledger upon the theory that you have borrowed the capital from yourself. As a matter of book-keeping the fiction of a "carrying charge" put forward in the *Massey-Harris* case will not hold unless the corresponding item is inserted to balance the other. The suggestion there put forward was, in my judgment, too absurd for serious argument.

How the *Massey-Harris* case can render any support to the city's argument here I cannot see. If anything, it supports the company's claim, because it is suggested in the judgment of the learned Chief Justice of the Common Pleas, at p. 359, that, had the *Massey-Harris* Company been obliged in fact to borrow the money required to purchase the bonds, the interest paid upon the

money so borrowed might have been deductible from the income derived from the bonds.

Nor does the *Stout* case apply, because there is no correspondence between the facts there and those in the present case, and because any observations there as to the right to deduct interest paid in respect of borrowed money were intended to apply to the case of an ordinary person whose ordinary income was derived from some other source than that of the business of dealing in stocks and bonds.

By para. (e) of sec. 1 of the Assessment Act, R.S.O. 1927, ch. 238, "Income" is defined as follows:—

"(e) 'Income' shall mean the profit or gain or gratuity, wages, salary, bonus or commission, or other fixed amount, or fees or emoluments, or profits from a trade or commercial or financial or other business or calling directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be; and shall include the interest, dividends or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and also profit or gain from any other source."

In determining what is the income as so defined, there is really no basis for comparison between that of an individual and that of a joint stock trading company. In the case of an individual engaged in business or in the practice of a profession, all the expenditures made in the course of the business or in the practice of the profession are properly deductible as having been necessary in the acquisition of his gross revenue. Household and living expenses for himself and those dependent upon him are deemed to be made out of his net earnings. They are not expended in the production of the income but out of it after it has been earned. If he invests in securities outside the range of his business or profession and raises money for that purpose in a way that is quite independent of the investments so made, interest paid upon the money so borrowed cannot be said to bear any legal relationship to the interest derived from the investments.

But the earnings of a joint stock trading company are, in the nature of things, to be determined upon an entirely different footing from those of an individual. The company exists for the sole purpose of carrying on business. It cannot properly have any personal or domestic or household expenses. Every cent of its expenditure must be used for the production of its revenue. If it sees fit, within its corporate powers, to borrow money in order to augment its gross income, I cannot see upon what principle

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interest paid upon borrowed money to earn this income is to be excluded as a proper deduction in arriving at its profits. English decisions which distinguish between interest paid for temporary loans which is deductible and that paid for long term loans all turn upon the express provisions of the English Income Tax statutes. There is nothing of that nature in our Municipal Assessment Act.

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Here the company, in the undoubted exercise of its corporate powers, sees fit to engage in the business of buying and holding bonds and shares issued by other companies, from which it derives an income. Whatever may be the law applicable to the case of an individual not engaged in that class of business as a business, who borrows money in order to acquire securities of that nature, the interest paid by the company here upon the money borrowed from the bank for the acquisition of the securities was paid as a business expenditure and should be treated as such just as fully as wages or any other item of the company's outgoings. What is assessable here is income in the sense of profit or gain derived from the company's trade or business. To hold that the company's profits or gains from its business amounted to so much, when as a matter of fact, by reason of the outlay of \$8,004.83 for interest paid upon the money borrowed to earn the revenues sought to be taxed, they were just that much less, is, in my opinion, not only contrary to the spirit of the statutory definition of the word "income," but in the very teeth of its express provisions, always keeping in mind that we are here dealing with the income of a joint stock trading company.

The answer to the first question submitted should be in the negative, and it should be declared that the whole item of \$8,004.83 for interest should be deducted from the gross receipts of \$27,091.

The company, having succeeded upon the main point urged before us, should get its costs in this Court.

Appeal dismissed with costs (ORDE, J.A., dissenting).

[APPELLATE DIVISION.]

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*Municipal Corporations—“Supervised Playgrounds”—Injury to Child
—Invitation—Representation—Negligence of Supervisor—Liability
of Corporation.*

The judgment of ROSE, J., 63 O.L.R. 626, was affirmed by a divided Court.

Held, by LATCHFORD, C.J., and RIDDELL, J.A., that the defendants were responsible for the injury to the boy plaintiff; and by MASTEN and ORDE, JJ.A., that the defendants were not responsible.

AN appeal by the defendants from the judgment of ROSE, J., 63 O.L.R. 626.

April 30 and May 1. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, and ORDE, JJ.A.

F. B. Proctor, K.C., and *Ainslie W. Greene*, K.C., for the appellants, argued that the injury to the infant plaintiff did not arise by reason of any negligence or want of care on their part, or on the part of their servants. The injury was occasioned by the tortious act of the boy Vézina, over whom the appellants had no control: *Ruoff v. Long & Co.*, [1916] 1 K.B. 148; *Hudson v. Napanee River Improvement Co.* (1914), 31 O.L.R. 47. The learned trial Judge made the appellants responsible for too broad a duty. It was reasonable for Bélanger, the supervisor, to assume that the second punishment would be curative—the theory underlying all criminal punishment. There was here the intervention of an intermediate will (Vézina's), which relieves the appellants from liability. If it had been Bélanger who had thrown the stone, the appellant might have been liable. Reference to *Scott v. Shepherd* (1773), 2 W.B. 892; Beven on Negligence, 4th ed., vol. 1, p. 38. The supervisor could not be expected to anticipate the second throwing of the stone: *Toronto Hydro-Electric Commission v. Toronto Railway Co.* (1919), 45 O.L.R. 470; *Wheeler v. Morris* (1915), 84 L.J.K.B. 1435; *Dominion Natural Gas Co. Ltd. v. Collins*, [1909] A.C. 640. Bélanger had ceased to be the appellants' servant when he administered the second punishment. This second kicking was retributive, not corrective: *Consolidated Mining and Smelting Co. of Canada v. Murdoch*, [1929] S.C.R. 141; *Radley v. London County Council* (1913), 109 L.T.R. 162; *Hutchins v. London County Council* (1915), 85 L.J.K.B. 1177. Counsel also urged that there was no evidence that the playground was a supervised playground, established and maintained by the appellants. The place was not a park: *County of*

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H. H. Davis, K.C., and *A. G. McHugh*, for the plaintiffs, respondents, contended that they were not being sued in tort. The gist of the action was neglect of the contractual duty to supervise. The evidence of cursing by Bélanger shewed that the appellants had employed an incapable or improper person as supervisor. The appellants are sued, not for causing the injury, but for not preventing it. They owed a duty to the children to keep them safe. Bélanger saw the boy Vézina throw a stone when he was kicked. And yet he went and kicked him again. He was negligent in not anticipating that if the boy was kicked again he would throw another stone, and, he being the appellants' servant, they were responsible: *Hesketh v. City of Toronto* (1898), 25 A.R. 449; *In re Polemis and Furness Withy & Co. Ltd.*, [1921] 3 K.B. 560. Under the *Polemis* case, it is no longer a question of what it is reasonable to expect will occur, but a question of the direct consequence of the act of negligence. Reference to *Jackson v. London County Council and Chappell* (1911-12), 76 J.P. 37 and 217; Shirley's Leading Cases, 10th ed., pp. 476, 477; Law Quarterly Review, vol. 44, pp. 101 and 112.

June 26. LATCHFORD, C.J.:—This appeal is from the judgment of Rose, J., of the 20th March, 1929, awarding the infant plaintiff, Harold McStravick, \$5,000 and his mother \$238.

The facts are fully stated in the reasons for the considered judgment of the learned trial Judge.

The material grounds of the appeal are:—

1. No evidence that the defendants are authorised by the Municipal or other Act to establish and maintain a supervised playground.

2. No evidence that the playground upon which the infant plaintiff was injured was a supervised playground established and maintained by the defendants.

3. The injury to the infant plaintiff did not arise by reason of negligence or want of care on the part of the defendants, their officers or servants.

4. The injury to the infant plaintiff was occasioned by the tortious act of another infant, Vézina, over whom the defendants had no control, and by mere mischance.

5. The damages awarded are excessive.

Dealing with these grounds in inverse order, I may say that the last was not stressed by Mr. Proctor, nor could it be, in view of the extent of the injury to the infant plaintiff.

It is a fact that the boy was injured by the act of another infant. Whether the defendants had or had not control of the wrongdoer will be dealt with later.

The third ground is not open to the defendants in view of their pleading. Paragraph 2 of the statement of claim is as follows:—

“The defendant is a municipal corporation and as such has established and conducts civic playgrounds throughout the City of Ottawa and employs supervisors to take charge of each playground.”

Bingham-square is one of such civic playgrounds.

Paragraph 1 of the statement of defence “admits the allegations contained in paragraph 2 of the plaintiffs’ statement of claim.”

No evidence was necessary to prove what was thus formally admitted nor was it incumbent on the plaintiffs to establish that the defendants were authorised by statute to establish playgrounds. They did establish playgrounds, among others Bingham-square. To supervise the civic playground on Bingham-square and the conduct of the children whom it impliedly invited to resort there and play, it appointed and paid one Bélanger, as Mr. Proctor admitted before the Court.

Bélanger was so acting for the defendants at the playground in Bingham-square when Harold McStravick while there was injured by a stone thrown at Bélanger by a boy of 12 named Vézina, who at the time was also on the playground.

Vézina had been playing where in the opinion of Bélanger he had no right to play. Bélanger subjected the boy to oral and physical abuse but did not eject him from the square. On becoming free, the boy retaliated by throwing a stone at the supervisor and hitting him. Bélanger then dealt with Vézina as he had in the first instance, and Vézina again retaliated as before, but, missing Bélanger, struck young McStravick, destroying one of his eyes and impairing the sight of the other.

The learned trial Judge dealt with the matters involved as follows (63 O.L.R. at pp. 628, 629):—

“I think the questions in this case are two questions of fact, the first whether the defendants assumed, or, what is the same thing, whether they held themselves out as having assumed, the obligation of taking reasonable care of such children as should resort to the playground, and the second, whether, granted the existence of the obligation, Harold McStravick’s injuries resulted from a failure by the defendants to use the reasonable care mentioned.

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"In my opinion each of the questions just stated ought to be answered in the affirmative. As to the first, something has been said, and it suffices to add that supervision, whether it be called supervision of the children or of their games or of the playground, involves at least some keeping of order, some stopping of fights, some general protection of the children against dangers that are known or that are to be apprehended. As to the second question, the case appears to me to be this: The supervisor, having observed Vézina's reaction to the first infliction of punishment, was warned that a repetition of the punishment might be followed by a repetition of the stone-throwing. Obviously, stones thrown by an angry boy, even if they are aimed at the supervisor, are a source of danger to the other children in the vicinity; and so if the supervisor felt bound to repeat the punishment his duty to the children other than Vézina was to take some care either to prevent Vézina from throwing stones or to protect those other children from such stones as might be thrown; and failure to perform that duty was negligence; and if there were no available means of checking Vézina's propensity to throw stones when punished in the manner first adopted, or of protecting the other children from such stones as might be thrown, then the second administration of punishment was, towards the other children, an act of negligence."

The test to be applied in such a case is declared by Lord Justice FitzGibbon, a very able judge, in *Sullivan v. Creed*, [1904] 2 I.R. 317, 339, to be this: whether a man of ordinary prudence, having regard to all the circumstances, ought to have anticipated the injury as the *not improbable* consequence of his action. In that case the injury was caused by the intervention of a person, unconnected in any way with the defendant, who had left a loaded gun inside a gap in a fence along a road, and a boy seeing the gun took it up and accidentally shot the plaintiff. Walker, L.J., said (pp. 349 and 350) that the defendant must be taken to have anticipated the reasonable probability that persons, including the young, the careless, and the inexperienced, who might pass along the highway, might see the gun and meddle with it, and that a boy of fifteen who took it up would use it in that careless or reckless manner in which a boy might.

I find myself unable usefully to add much to the reasons stated by the learned trial Judge, except to point out as what I think is a material factor in attributing liability to the defendants, the absolute unsuitability of their servant for the office to which they had appointed him. The supervision of a playground calls for the exercise of qualities which Bélanger's conduct proved that he totally lacked. Such an employee should be good-tempered and

prudent, while Bélanger was manifestly irascible and without judgment or common sense. No evidence was given that previous to appointing him the defendants had any inquiry made as to his fitness to discharge the duties of the position of supervisor of one of their playgrounds. In that respect they failed, I think, in fulfilling a duty which they owed to the boy McStravick, among other children resorting to Bingham-square.

The appeal, in my opinion, should be dismissed with costs.

RIDDELL, J.A.:—It is in the pleadings claimed and admitted that, “The defendant is a municipal corporation and, as such, has established and conducts civic playgrounds throughout the City of Ottawa, and employs supervisors to take charge of each playground.”

In a certain “supervised” playground in the city, in the early summer of 1927, a little lad named Vézina was playing with some girls. I assume that this most natural conduct was against some rule or direction applicable to the playground; at all events, the “supervisor,” Bélanger, caught Vézina at the offence, and, instead of mildly rebuking him, cursed at him and kicked him about six times. Boys, of course, act and react differently; this boy reacted by picking up a stone and throwing it at Bélanger, striking him on the finger. Thereupon, Bélanger proceeded to kick him again, and the reaction was the same. Vézina picked up another stone and threw it at the “supervisor;” but he missed him this time, and the stone went on and struck another little boy, who had also come to play on the “supervised playground,” knocking out his eye. An action being brought against the city corporation by the lad and his mother, the learned trial Judge, Mr. Justice Rose, gave judgment in favour of the plaintiffs; the defendants now appeal.

While the defendants are not bound by law to establish such playgrounds, no one would say that they are not laudable enterprises for the corporation; and, if they see fit to establish them, they are liable for damages caused by the negligence of their servant therein, while in the exercise of his duty in respect thereof: *Hesketh v. City of Toronto*, 25 A.R. 449. It was suggested rather than argued, and that somewhat feebly, that the defendants had no power to institute such a playground and *County of Los Angeles v. Dodge*, 51 Cal. App. 492, 197 Pac. Repr. 403, was cited as indicating that such a place was not a “park.” This case went off upon the statute and is of no assistance to us here. We have our own terminology, our own use of the English language, and I have no hesitation in saying that the playground in this instance comes within our statutes, the Municipal Act, R.S.O. 1927, ch.

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McSTRAVICK 233, sec. 396 (45), (46), and the Public Parks Act, R.S.O. 1927, ch. 248. I am not to be considered as deciding that, if no express power could be found in the statutes, the defendants would therefore be relieved from liability.

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What, then, is the duty of the defendants in respect of children whom they invite to come and make use of their "supervised playground?" Very many cases were cited to us more or less in point. I do not think it necessary to discuss them: no one will dispute that, whatever the superior limit of duty may be, the inferior limit will not be above a duty to save from unnecessary danger occasioned by the act of the city's servant in the exercise of his supervising power with which he was entrusted as such servant.

There is no complaint—or, at least, need be no complaint—by these plaintiffs concerning Bélanger before the second kicking of young Vézina. As has been said, and as was said on the hearing of the appeal repeatedly, boys are not all alike—some react in one way, others in another, to a "licking." It may have been all wrong for Vézina, when kicked by Bélanger, to disregard the well-known poetical advice and refrain from "heaving rocks at him;" but I, for one, bearing in mind certain experiences more than six decades ago, cannot say that it was unnatural—indeed, some older men might plead guilty to a sort of subliminal sympathy with him. However wrong was Vézina's reaction, Bélanger saw what kind of a boy he was, and had a right to expect that the same reaction would follow the same provocation. With that knowledge, actual or necessarily imputed, Bélanger kicked the high-spirited and somewhat daring lad again; and what he ought to have expected took place—another stone was thrown at him; it unfortunately missed the person for whom it was intended, and who, if any one, deserved it, and struck the boy plaintiff. The "supervisor" should have known, also, that there was a great chance of Vézina missing him the second time, and should have guarded all the children on the playground, including the plaintiff boy, from the danger of being hit by a random shot; he had the right, the power and the duty, to remove Vézina—and, at the least, he had the right, the power and the duty, not to do what was likely to cause a stone to fly which might hit one of the children.

I can find no error in the judgment appealed from and would dismiss the appeal with costs.

ORDE, J.A.:—I have carefully considered the judgments of my Lord and my brother Riddell, as well as that of the learned trial Judge, and I find myself unable to agree with their conclusion that the defendant corporation is liable for the injuries

sustained by the infant plaintiff. The circumstances of this case are, in my opinion, clearly distinguishable from those in any other reported case. There was here a break in the chain of causation, a *novus actus interveniens*, between the alleged negligence of the defendants' servant and the injury suffered by the plaintiffs. If the defendant corporation is to be held liable in this case for an injury caused by the intervening volition of another reasoning being, our decision will go further, I believe, than the law has yet gone.

The injury was caused by a stone deliberately thrown by the boy Vézina at Bélanger, the defendants' employee charged with the duty of supervising the ground upon which the infant plaintiff and other children were playing. The throwing of this stone was doubtless in retaliation for the punishment Vézina had received from Bélanger for throwing the first stone, but it was done as a deliberate act of volition on Vézina's part after he had retreated to what he thought was a safe distance. There was nothing in what he did in any sense resembling the involuntary and impulsive acts of those who to escape the danger to themselves tossed on to the plaintiff the squib thrown by the defendant in *Scott v. Shepherd*, 2 W. Bl. 892. In that case the squib which caused the injury was started on its dangerous career by the defendant himself.

The learned trial Judge has held that the only questions involved in the case are two questions of fact, "the first whether the defendants assumed, or, what is the same thing, whether they held themselves out as having assumed, the obligation of taking reasonable care of such children as should resort to the playground, and the second, whether, granted the existence of the obligation, Harold McStravick's injuries resulted from a failure by the defendants to use the reasonable care mentioned." And he answered both these questions in the affirmative.

As to the first answer I entirely agree. The duties of the supervisor do not appear to have been exactly defined, but I agree with the learned trial Judge that supervision involved at least "some keeping of order, some stopping of fights, some general protection of the children against dangers that are known or that are to be apprehended." But it is obvious that there must be some limit to the responsibility so imposed upon the supervisor. The number of children upon the grounds at the time, the kind of games they are playing, and the characters of the children themselves, whether peaceable or fractious, might in the particular circumstances be important factors in determining whether or not the supervisor had been guilty of some negligence in the performance of his duties which would render his employers

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App. Div. liable. The children who frequent the playground come presumably of their own free will or are sent there by their parents. There may be, in a sense, an invitation extended to the children resulting from the opening of the ground as a playground for them. And I agree that the description of the ground as a supervised playground and the appointment of a supervisor carry with them an obligation to do more than act as a mere caretaker of the city's property. There must be some oversight and control of the children themselves, but the fact that the ground is to be used as a "play" ground and a supervised playground at that, indicates, I think, that the primary purpose of the supervision was the oversight and control of the games and other forms of play in which the children would indulge, rather than the protection of the children against some unforeseen act of wrongdoing by one of themselves.

Of what breach of any duty which he owed to the infant plaintiff was Bélanger guilty? There has been in the present case an assumption, unfounded in my opinion, that in what he did by way of punishing Vézina for having hit him with the first stone, Bélanger neglected or exceeded or wrongly performed his duty to the other children. Had he himself thrown a stone at Vézina and missing him had thereby hit another child, the case would be different. Or had he, for example, in attempting to kick or hit Vézina, kicked or hit another child, his employer might be held liable. Or had some missile wrongfully thrown at Vézina been warded off by the latter and so have injured another child, the case would come squarely within *Scott v. Shepherd, supra*.

It is of course plain that, in order to render the defendant corporation liable, Vézina's throwing of the second stone must be deemed to be what might reasonably be expected as the result of the second punishment, because Vézina had thrown a stone in retaliation for his first punishment. And the judgment of the learned trial Judge and of those of my brethren who agree with him hold that it was to be so expected. I am unable to follow the reasoning which arrives at this result. It is, I think, just as reasonable to believe that the second punishment of Vézina would bring him to his senses and cause him to behave himself as to assume that his reaction would be the same as before. Bélanger was not dealing with an unreasoning animal like a mad dog or a rattlesnake which might better be left alone and not provoked into renewed activity. Vézina was a reasoning human being, a boy it is true, but nevertheless one who might be expected to respond properly to punishment. Suppose that Bélanger had done nothing after the first stone-throwing, and Vézina, emboldened by

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his success in hitting Bélanger with the first stone, had followed with a second and had so injured another child, might it not have been argued that, in making no attempt to stop Vézina, Bélanger had neglected his duty as a supervisor? There would then have been some analogy to the case of *Canadian Pacific Railway Co. v. Blain* (1903), 34 Can. S.C.R. 74, where the railway company was held liable because its conductor failed to take steps to protect a passenger from a repetition of two assaults committed by another passenger.

The case which perhaps comes nearest to the present is that of *Jackson v. London County Council and Chappell*, 28 Times L.R. 359, 76 J.P. 37 and 217, mentioned by the learned trial Judge. But that case is really quite distinguishable from this. The mixture of sand and lime deposited on the school grounds by the contractor was at once recognised as dangerous by the headmaster, who ordered its removal by the contractor. It was not removed and nothing was done. What the headmaster feared then happened. The boys began throwing the stuff at each other, and one boy was injured. The finding of a jury that there was negligence both on the part of the school authorities and of the contractor in leaving what they knew to be a dangerous thing within the reach of a body of schoolboys was upheld by the Court of Appeal. It is quite clear from the judgments that it was only because of the recognition by the headmaster of the danger involved in leaving the stuff in the school-yard that the verdict was sustained. That fact brought the case into the allurement class. I cannot see its application to the present case.

The judgment of the House of Lords in the case of *Owners of Steamship Singleton Abbey v. Owners of Steamship Paludina*, [1927] A.C. 16, contains much that is instructive here. It was held there that the final collision with the Steamship *Sara*, which caused the injuries to the *Singleton Abbey*, was not caused by the negligence of the *Paludina*, but that the action of the *Sara* constituted a *novus actus interveniens*. The late Lord Phillimore, in his dissenting judgment at p. 32, states:—

“In the case of a tort or quasi-delict, the wrongdoer is certainly liable for damages not directly produced by his own act but supervening in direct and natural consequence.”

After some reference to the authorities, he then proceeds:—

“Two propositions and two only should, I think, govern our present decision.

“(a) If the action which brings the injury for which the damage is sought to be recovered is human action, either of the injured person himself or of some third person, this *novus actus*

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Scott v. Shepherd, 2 W. Bl. 892, the "squib" case, is an example of an alternative danger presented to a third person, and *Jones v. Boyce* (1816), 1 Stark. 493, which was recently followed by our Appellate Division in *Van Camp v. Anderson and Carter* (1928), 63 O.L.R. 257, is an example of the alternative danger presented to the injured person himself.

Was there anything in the present case which can bring it within the principle (b) above mentioned? There was no situation of alternative danger in which the third person, Vézina, was placed which rendered it uncertain whether it would be better for him to act by passing the danger on or not, and in which his passing on of the danger would not break the chain of causation. There was on the contrary a deliberate exercise of his will as a human being, which, in my judgment, constituted a *novus actus interveniens*. It was that intervening act which injured the plaintiff, and not the act of Bélanger, whether his conduct be regarded as negligent or otherwise.

Lest it may appear to have been overlooked, a word ought to be added as to the defence set up by the defendant corporation that it had no statutory authority to open or to operate "supervised playgrounds" or to appoint a supervisor, and that if it had it had never passed a by-law giving effect to such authority. The plaintiff's rights do not depend upon contract, and it is not open

to the defendant corporation to set up its lack of authority, if any, in an action based upon the alleged negligence of its own employee. This playground belonged to the municipality, and Bélanger was employed and paid by the defendants for performing certain duties in connection with it. The principle *respondeat superior* clearly applies in such a case, and the defendants, if otherwise liable, cannot escape upon any such technical defence as this.

I would allow the appeal and dismiss the action.

MASTEN, J.A., agreed with ORDE, J.A.

The Court being equally divided, appeal dismissed.

[APPELLATE DIVISION.]

AMELL v. MALONEY.

1929.

June 26.

Landlord and Tenant—Lease of House—Contract of Landlord (Independent of Demise) to Rebuild Chimney and Reshingle Roof—Failure to Fulfill—Damages for Destruction of Tenant's Chattels by Fire Caused by Defective Chimney—Whether within Contemplation of Parties—Negligence—Action Laid in Tort.

In a house rented by the plaintiff from the defendant there was a defective chimney, which the defendant undertook to rebuild. He also undertook to reshingle the roof. Two months after the plaintiff had moved into the house and placed his chattels in it, the house was burnt down and with it the plaintiff's chattels, the undertaking to repair and reshingle not having been fulfilled. The fire was caused by sparks from the chimney reaching the old shingles on the roof. The plaintiff, who had repeatedly warned the defendant of the danger, sued in tort for the value of his chattels. The trial Judge treated the action as one for breach of contract, and gave judgment for \$250:—

Held, upon appeal, that the defendant was properly held liable.

Per MASTEN and FISHER, J.J.A.:—The agreement to rebuild and reshingle was a condition on which the plaintiff accepted the lease and entered.

As to the damages, the quantum could not be interfered with. The rule requiring a tenant to minimise his loss, by himself repairing at the expense of his landlord, does not apply where the landlord acknowledges his undertaking and promises to fulfill it. By his agreement the defendant assumed the duty of repairing within a reasonable time; and his neglect to do so after repeated warnings was negligence entitling the plaintiff to sue in tort.

In re Polemis and Furness Withy & Co., [1921] 3 K.B. 560, applied.

The defendant was liable for all the direct consequences of his negligence, whether he contemplated the resulting destruction of the plaintiff's chattels or not.

Per LATCHFORD, C.J., and ORDE, J.A.:—The contract was not a covenant to repair, but a contract independent of the demise, stipulated for by the tenant and without which he would not have accepted the demise.

The damages sustained by the plaintiff were such as might be deemed to have naturally arisen from the breach of contract, in the special circumstances, and must be deemed to have been in the contemplation of the parties when the contract was made.

AN appeal by the defendant from the judgment of the County Court of the United Counties of Stormont Dundas and Glengarry in favour of the plaintiff.

The following statement is taken from the judgment of MASTEN, J.A.:—

Appeal from the judgment of his Honour Judge O'Reilly, dated the 17th December, 1928, awarding the plaintiff \$250 damages. The action is in tort for negligence of the defendant resulting as alleged in loss of chattels of the defendant through fire. The

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defendant owned a farm with an old dwelling on it. The plaintiff rented the farm for a year at a rental of \$150, and he alleged that, as a condition of the lease, the landlord agreed to do certain repairs, including, among others, the rebuilding of the south chimney, which was defective, and the reshingling of the dwelling.

In pursuance of the lease, the plaintiff moved to the farm with his family, goods and chattels, on the 3rd April, 1926. The chimney was not rebuilt nor the roof reshingled, and on the 2nd June the house burned down and the plaintiff's chattels with it. The plaintiff alleges that the fire occurred as a result of sparks falling on the loose shingles of the old roof, in consequence of the defective condition of the old chimney which the defendant had undertaken to rebuild.

The defendant denies his undertaking to rebuild the chimney and says in any case it was no part of the lease and he is not bound; secondly, that the damages, if any, arise out of contract and are too remote; third, that if any damages are recoverable they can be no more than the cost of rebuilding the chimney, \$7 or \$8 at the most.

The findings of the trial Judge are as follows:—

"I find the following facts. That the defendant expressly agreed with the plaintiff to repair the chimney in question, reshingle the roof and repair the fence, and the only thing he did was to repair the fence. That he was shewn the dangerous condition of the chimney in question, which was the only one the plaintiff could use and that he had ample notice of its condition and that the danger was aggravated by the old shingles being left on the roof. That about a month prior to the house being burned down the defendant was on the premises, was warned by the plaintiff that he feared the house would be burned down and his chattels would be destroyed. That on two previous occasions he had been notified of the danger of not making repairs. That he agreed to have the repairs done immediately and that there was unreasonable delay on his part. That the fire was caused by sparks reaching the old shingles on the roof through the defective chimney. That, had the chimney been properly repaired and the roof reshingled, in all probability the house would not have been burned down, and the plaintiff's chattels would not have been destroyed. That the likely destruction of the plaintiff's chattels was brought to the defendant's notice about a month before the fire and that he had ample opportunity to make the repairs he had agreed to have done to the chimney and roof. That his failure to do as he agreed made him liable for breach of his agreement and that the damages which resulted were or should have been in contemplation by the

defendant for at least a month, and possibly longer, before the house burned down."

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May 15. The appeal was heard by LATCHFORD, C.J., MASTEN, ORDE, and FISHER, J.J.A.

George A. Stiles, K.C., for the appellant, argued that there was no covenant on his part to repair the chimney; nor was there any undertaking on his part to do so. The damages, if any, arose out of contract, and were too remote. Reference to *Brown v. Trustees of Toronto General Hospital* (1893), 23 O.R. 599; Woodfall's Law of Landlord and Tenant, 22nd ed., p. 760. The only damages that could be recovered would be the cost of rebuilding the chimney, a few dollars only.

D. L. McCarthy, K.C., for the plaintiff, respondent, contended that the findings of the learned County Court Judge were correct. As to the law, the agreement to rebuild the chimney and reshingle the roof was a condition on which the plaintiff accepted the lease: *Morgan v. Griffith* (1871), L.R. 6 Ex. 70, 23 L.T.R. 783; *Mann v. Nunn* (1874), 30 L.T.R. 526; *Makin v. Watkinson* (1870), L.R. 6 Ex. 25. The damages were not too remote. The appellant was notified by the respondent, long before the fire, of the danger, and promised to rebuild the chimney, but failed to do so, and so was liable for the direct consequence of his negligence.

June 26. MASTEN, J.A. (after stating the facts as above):—The evidence supports the findings of fact of the learned trial Judge. He treats the action as one for breach of contract. As it seems to me, it is properly launched by the plaintiff as an action of tort for negligence in omitting or neglecting for an unreasonable length of time to fulfill the duty to the plaintiff which he had undertaken, viz., to rebuild the chimney and reshingle the roof. The trial Judge finds that "the fire was caused by sparks reaching the old shingles on the roof through the defective chimney." I think that finding is clearly warranted by the evidence of William Benn and Annie McPhail.

It is impossible on the whole evidence to interfere with the findings of fact of the trial Judge, and I ought perhaps to go further and say that I agree with them.

Turning now to the legal points which the case develops, it is trite law that the agreement to rebuild the chimney and reshingle the roof may be established as a condition on which the plaintiff accepted the lease and entered: *Morgan v. Griffith*, L.R. 6 Ex. 70; *Erskine v. Adeane* (1873), L.R. 8 Ch. 756.

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There remains the question of damages. On this Mr. Stiles, for the appellant, relies on *Brown v. Trustees of Toronto General Hospital*, 23 O.R. 599, holding that the tenant should himself repair at the expense of the landlord. See also *Ideal Phonograph Co. v. Shapiro* (1920), 48 O.L.R. 618, where it is held that the tenant is bound to minimise his loss, if that may be done by having the defects repaired, and that he is entitled to recover from his landlord either his actual loss or the cost of repairing, whichever is the least.

But that rule does not apply where the landlord, instead of refusing to make the repairs or maintaining absolute silence, on different occasions, when requested by the tenant to make the agreed repairs, acknowledges his undertaking and promises to fulfill it. In such a situation the rule was laid down by our Court of Appeal in *McEwan v. McLeod* (1881), 46 U.C.R. 235, affirmed in appeal (1884), 9 A.R. 239. That was a case where a vessel had been chartered to receive and convey in October a ship-load of salt. The owners diverted the ship to other work in contravention of their contract, but continuously promised to fulfill the charter very shortly, and the plaintiff, relying on such promises, omitted to charter another vessel during the season of navigation. Before the cargo could be conveyed, navigation closed and the salt had to be conveyed by rail at an increased expense. The shipper was held entitled to recover, among other things, the extra cost of shipment.

A very apposite decision is to be found in 17 Corpus Juris, p. 771, the note of which is as follows:—

“In an action by a tenant against his landlord for damages to goods from a leaky roof through a considerable period of time, the tenant was held excused from a failure to repair the roof himself, it appearing that the landlord had undertaken to repair the leak, and that he had made several unsuccessful efforts to do so. *Dempsey v. Hertzfield* (1860), 30 Ga. 866.”

In the circumstances of this case, the tenant, if he had himself rebuilt the chimney, ran the risk of being held to have unwarrantably interfered with the building.

As to remoteness of damage, I have already pointed out that the evidence fully supports the finding that the fire and the consequent destruction of the plaintiff’s chattels resulted from the defective condition of the chimney. By his agreement as found, the defendant assumed towards the plaintiff the duty of rebuilding the chimney within a reasonable time. His neglect so to do after repeated warnings was negligence entitling the plaintiff to sue in tort as he has done, and the case falls within the decision of the

Court of Appeal in *In re Polemis and Furness Withy & Co.*, [1921] 3 K.B. 560.

It is plain on the evidence that long before the fire occurred the defendant was directly notified by the plaintiff that a fire was reasonably to be anticipated from this defective chimney, and, while promising to rebuild it, nevertheless neglected to do so.

Consequently he is liable for all the direct consequences of that negligent act, whether he contemplated the resulting destruction of the plaintiff's chattels or not, and also regardless of whether such damages were in the contemplation of the parties at the time when the lease was originally negotiated in the preceding March.

The quantum of damages cannot be interfered with.

In the result the appeal should be dismissed with costs.

FISHER, J.A., agreed with MASTEN, J.A.

ORDE, J.A.:—If the plaintiff's right to relief depended solely upon a breach of an ordinary covenant to repair on the part of the landlord contained in a lease, there might be some doubt as to whether damage to the chattels, belonging to the tenant and forming no part of the demised premises, would be recoverable, notwithstanding the dictum of the late Chancellor in *Brown v. Trustees of Toronto General Hospital*, 23 O.R. 599, at pp. 604, 605, to which the learned trial Judge refers. That damages for breach of a landlord's covenant to repair caused to other portions of the demised premises than that immediately affected by the state of non-repair, due to the landlord's neglect or delay in making the repairs, may be recovered, seems to be established by *Green v. Eales* (1841), 2 Q.B. 225, at p. 238.

But this was not an ordinary covenant to repair at all. Speaking broadly, a covenant to repair refers to dilapidations arising during the demised term. Here there was a contract independent of the demise itself, stipulated for by the tenant and without which he would not have accepted the demise. The contract required the landlord, not to repair in the ordinary sense, but to put the demised premises into a condition of safety by rehabilitating the chimney. The purpose of the work he agreed to do must of necessity have been to protect the house and its contents from injury by fire. That is one of the primary objects of a chimney.

Applying to the consequences of the defendant's failure to perform his bargain, and the negligence involved in his repeated but unfulfilled promises to do the work, principles applicable to any other contract and the neglect of duty arising from a long delayed failure to perform it, I am of the opinion that the dam-

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ages sustained by the plaintiff are such as may be deemed to have naturally arisen from the breach of contract, in the special circumstances, and were such as must be deemed within the contemplation of the parties when the contract was made, and so within the rules laid down in *Hadley v. Baxendale* (1854), 9 Ex. 341.

I think the appeal should be dismissed.

LATCHFORD, C.J., agreed with ORDE, J.A.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

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LOVE v. DENNY AND VINCENT.

Malicious Prosecution—Theft—Finding of Jury as to Motive of Prosecutor—Endeavour to Obtain Payment for Goods Sold—Finding of Trial Judge of Absence of Reasonable and Probable Cause—at what Stage to be Made—Judicature Act, R.S.O. 1927, ch. 88, sec. 63—Failure of Prosecutor to Disclose Facts to Solicitor and Magistrate—Absence of Honest Belief in Criminal Offence.

At an auction sale held by the defendants, the plaintiff bought a cow. The terms of sale called for cash or approved promissory notes. The plaintiff said that the defendant D. agreed to accept the plaintiff's father or one W. as endorser of the note which the plaintiff proposed to give for the price of the cow. D. said that he approved of the plaintiff's father but not of W. The plaintiff left at the defendant's office a note signed by himself and endorsed by W., and the cow was taken to the plaintiff's farm. D. returned the note to the plaintiff, saying that it was not according to agreement, and demanded a note endorsed by the plaintiff's father or the return of the cow. The plaintiff not complying with the demand, D. laid an information against the plaintiff for theft of the cow, and the plaintiff was arrested and taken to gaol, but was admitted to bail and afterwards discharged. He brought this action for malicious prosecution. The trial Judge found that D. had no reasonable and probable cause for the criminal proceedings; and the jury found that D. had an improper motive in bringing the proceedings, viz., to procure the value of the cow, and that D. did not make a full disclosure of all the important facts to the magistrate and the Crown Attorney. Upon appeal by D. to a Divisional Court:—
Held, upon the evidence, that D. failed to make a full and fair statement of all the facts either to his solicitor, upon whose advice he said he acted, or to the magistrate, and therefore the advice and direction said to have been received from them did not afford an answer to the plaintiff's contention that there was a lack of reasonable and probable cause.

Held, also, upon the evidence, that D. did not honestly believe that the plaintiff was a thief and stole his cow.

The trial Judge did not determine the question of reasonable and probable cause until after the jury had passed upon the question of malice:—

Held, by LATCHFORD, C.J., and MAGEE, J.A., that the decision as to reasonable and probable cause should be made by the Judge and announced before the jury is called upon: *Judicature Act*, sec. 63. And *held*, MASTEN and FISHER, J.J.A., expressing no opinion as to the power of a trial Judge to adopt the procedure indicated, that the adoption of it afforded no valid ground of objection to the judgment given in favour of the plaintiff.

The same facts and circumstances which are relevant to the question of reasonable and probable cause are also relevant and may be considered by the jury in determining the question of malice.

Here the trial Judge found absence of reasonable and probable cause upon an independent consideration of all the circumstances.

Remarks by RANEY, J., the trial Judge, upon the extraordinary procedure adopted in sending three constables, at night, to the plaintiff's farm, a distance of 30 miles, to effect his arrest, when a summons would have sufficed.

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AN action for malicious prosecution.

The action was tried before RANEY, J., and a jury, at Whitby.
W. F. Gregg, for the plaintiff.

J. C. McRuer and *J. A. McGibbon*, for the defendants.

December 21, 1928. RANEY, J.:—The plaintiff is a tenant-farmer, and the defendants are drovers. At an auction sale of cattle held by the defendants on the 3rd December, 1927, the plaintiff was the purchaser of a cow. The terms of sale called for cash or approved promissory notes. There was some discussion after the close of the sale between the plaintiff and the defendant Denny as to who the backer of the plaintiff's note would be. At the trial the plaintiff alleged that Denny had agreed to accept the plaintiff's father or one Whitter; the defendant Denny, on the other hand, declared that he had approved of the father, but not of Whitter. The day following the sale, in the absence of Denny, the plaintiff took the cow away, leaving with the defendants' clerk a promissory note signed by himself and Whitter. Denny endorsed the note with the firm name, and it was deposited in their bank for collection. At the trial he explained—and I believed him—that the endorsement had been by inadvertence, and that, by a second inadvertence, the note had been deposited in the bank along with the other sale-notes. A few days later, Denny procured the note from the bank and consulted a solicitor, who wrote to the plaintiff on the 17th December, returning the note, saying it was not according to agreement and demanding either a note signed by the plaintiff's father or the return of the cow, but not explaining that the endorsement and deposit of the note with the bank were

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inadvertences. The plaintiff answered, claiming that the note was given pursuant to the agreement and that he had witnesses to that effect. He also raised a question as to a representation, which he said Denny made at the sale, that the cow would freshen in January or February. This representation, which Denny did not deny in his evidence at the trial, turned out to be different from the facts. Further letters from the solicitor followed threatening proceedings, but not indicating specifically what the nature of the proceedings would be, and early in January Denny visited the plaintiff and told him that his solicitor had advised him that he could have him arrested. At this time the plaintiff offered to pay for the cow if some allowance was made to him for the misrepresentation, or to return the cow if an allowance was made to him for her keep for the month, or so, he had had her. This visit was followed by a letter from the solicitor, dated the 10th January, advising the plaintiff that Denny claimed that he had taken the cow "under circumstances amounting to theft," and, that, unless the cow were returned, he would advise Denny to take action against him "for wrongfully taking of cow." Then, on the 12th January, Denny attended before the magistrate at Whitby and swore to an information for theft, and thereupon three constables drove out to the plaintiff's farm, a distance of upwards of 30 miles, brought him to Whitby late at night and lodged him in the lockup there. Next day he was admitted to bail, and a few days later, on his appearance before the police magistrate, he was discharged.

Questions were submitted to the jury and answered as follows:—

"1. Did the defendant Denny have an improper motive in bringing the criminal proceedings? A. Yes.

"2. What was Denny's motive in bringing the proceedings? A. To procure the value of the cow.

"3. Did the defendant Denny make a full disclosure of all the important facts to the magistrate and the Crown Attorney? A. No.

"4. Did the defendant Denny expect that Love would be arrested as a result of his proceedings? A. Yes.

"5. Damages? A. \$500."

The question for my determination is whether the defendant Denny had reasonable and probable cause for the criminal proceedings.

In the first place, he knew when he swore to the information that the plaintiff was contending that he, Denny, had agreed to accept Whitter as an endorser of the note. I was satisfied by the evidence at the trial that Denny did not agree to this, but I was

not satisfied that the plaintiff was dishonest in his contention. I thought it was possible that there had been a misunderstanding on the part of the plaintiff and his witnesses.

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In the second place, when the note was returned by the defendants' solicitors to the plaintiff it carried the endorsement of the defendants and the stamp of the bank, and, in the absence of Denny's explanations of the inadvertences, the plaintiff was justified in assuming that the defendants had accepted the joint note signed by himself and Whitter. If that had been true it would not have been open to the defendants to change their minds.

In the third place, the plaintiff had offered to return the cow, which was not as represented by Denny at the sale, on being paid for her keep, or to pay for her if Denny would make allowance for the misrepresentation.

In view of these considerations and the jury's answers, I think the case was one for the Division Court and that Denny did not have reasonable and probable cause for the criminal proceedings.

I ought not, I think, to part with the case without a further reference to the extraordinary procedure (whoever was responsible for it) of sending three constables such a distance in the night time to effect the arrest of a man who, no doubt—there was no evidence to suggest the contrary—would have answered a summons.

There was evidence at the trial as to other troubles in which the plaintiff had figured; but, whatever his previous record may have been, he was certainly not a cattle-thief, and much less was he a desperado. He was living with his family on a farm which he was cultivating, and it would have been time enough to issue a warrant if he had failed to answer a summons.

There will be judgment for the plaintiff against the defendant Denny for \$500 and costs on the County Court scale, without set-off, and the action will be dismissed as against Vincent, against whom there was no evidence, with costs.

The defendant Denny appealed from the judgment of
RANEY, J.

May 27. The appeal was heard by LATCHFORD, C.J., MAGEE, MASTEN, and FISHER, J.J.A.

J. C. McRuer, for the appellant. The learned trial Judge erred in finding that there was a lack of reasonable and probable cause for the arrest of the plaintiff. In support of that contention, I submit that the criminal proceedings were instituted on the advice of counsel and after conference with the magistrate who issued

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the warrant: *McMullen v. Wetlaufer* (1914), 32 O.L.R. 178. The learned trial Judge erred in submitting to the jury questions that went to determine reasonable and probable cause, and did not rely on his own judgment to determine this. The learned Judge in his charge confused what was for him to determine and what was for the jury.

W. F. Gregg, for the plaintiff, respondent. The plaintiff did prove want of reasonable and probable cause. The learned Judge was in no way confused as to the respective provinces of himself and the jury in regard to reasonable and probable cause. The appellant is not protected by advice of counsel, because he did not fully instruct his counsel on the facts. The learned Judge determined the question of reasonable and probable cause on his own judgment. Reference to *Longdon v. Bilsky* (1910), 22 O.L.R. 4; *Harris v. Bickerton* (1911), 24 O.L.R. 41; *Connors v. Reid* (1911), 25 O.L.R. 44.

June 26. MASTEN, J.A.:—Appeal by the defendant Denny from the judgment of Raney, J., dated the 21st December, 1928, after a trial before a jury, the judgment being entered in favour of the plaintiff for \$500 and costs on the County Court scale in an action for damages for malicious prosecution.

The notice of appeal sets out 16 grounds of appeal, but in opening his argument counsel for the appellant stated the following points for the consideration of the Court. First, that there should be a reversal of the finding of the trial Judge that there was a lack of reasonable and probable cause for the arrest of the plaintiff, and, in support of that contention, that the criminal proceedings were instituted on the advice of counsel and after conference with the magistrate who issued the warrant. He also relied on certain irregularities in the conduct of the trial, including submission to the jury of questions bearing on reasonable and probable cause.

I agree with the conclusion of the trial Judge that there was a lack of reasonable and probable cause, and also in the reasons on which his conclusion is founded, but I desire to add certain further considerations which have presented themselves to me on a consideration of the evidence. That consideration has convinced me that the defendant Denny failed to make a full and fair statement of all the facts either to Mr. Browning, his counsel, or to the magistrate who issued the warrant, with the result that the advice and direction received from these gentlemen does not afford an answer to the plaintiff's contention that there was a lack of reasonable and probable cause.

Further, I have been unable to persuade myself that Denny himself honestly believed that Love was a thief and stole his cow.

These two conclusions rest for the most part on the evidence of the witnesses for the defence and necessitate some reference to the facts, including dates, and to the evidence.

The beginning of the differences between the plaintiff and the defendant arose at an auction sale held by the defendant on Saturday the 3rd December, 1927, at which sale a cow was knocked down to the plaintiff. The terms of the sale were cash or six months' note with an approved endorser. A promissory note was to be given contemporaneously with delivery and possession of the cow. Regarding the endorser of the note, the plaintiff Love has always claimed that the defendant Denny agreed to accept one Whitter, or Love's father, as an endorser. This is denied by Denny. The sale having taken place on Saturday, by arrangement the cow was left at the place of sale, and on Monday the note, as drawn by the defendants' agent, was signed by Love and Whitter, and was given to a party of neighbours consisting of Reynard, Sheir, and Brown, who were going with a truck to the place where the cow was and were to bring it to Love's farm. These persons left the note "at the store" and got the cow. Love was not present and did not take the cow. It was brought to his farm, as Denny well knew, before the information was sworn.

On or about the 17th December, two weeks after the sale, the note signed by Whitter was returned through a solicitor to Love, with the complaint that the only endorser whom the defendant Denny had agreed to accept was Love's father. From the 17th December until shortly before the 12th January, 1928, correspondence passed between Browning, solicitor for the defendant Denny, and Love, the plaintiff, the solicitor endeavouring to obtain a satisfactorily endorsed note or the cash. Shortly before the 12th January, the defendant Denny, accompanied by one Whippey, went out to Love's farm and discussed with Love an adjustment of the difficulties. The defendant saw the cow at that time, but there is no evidence that he demanded possession^o of her, or indeed that he was willing to take her back. His purpose appears to have been entirely to carry out the executory contract for the sale of the cow by obtaining either \$80 cash or a promissory note endorsed to his satisfaction. Neither of these things was accomplished, and on the 12th January he went to Whitby and swore out an information in the following terms:—

"The information and complaint of Oliver Denny, of the township of Whitby, in the county of Ontario, taken this 12th day of January, A.D. 1928, before the undersigned, Police Magistrate of

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the Township of Whitby, and *ex officio* one of his Majesty's Justices of the Peace in and for the said County of Ontario, who saith that Oswald Love, of the township of Scott, did commit the offence of theft by stealing one cow at the township of Whitby, the property of Denny and Vincent, on the 5th day of Dec., 1927, contrary to the Criminal Code."

Masten, J.A. The plaintiff was arrested at his home on the 16th January and brought to Whitby and imprisoned. He was bailed out on the 17th, committed for trial before the County Court Judge, and upon his trial was discharged.

The original note signed by the plaintiff and Whitter was, in some way not explained in the evidence, ultimately returned to Denny and by him put in the bank and has been paid by Love. Thus the executory contract entered into at the auction sale on the 3rd December has now been fully carried out, the cow being the property of the plaintiff Love, and the defendant Denny having received the full purchase-price.

In support of the opinion which I have formed that the defendant failed to give to Browning, his counsel, or to the magistrate, Willis, a full and a frank statement of all the facts and circumstances, it is necessary to refer to the evidence of Browning and of Willis, who were examined as witnesses at the trial. In the course of his evidence Browning says:—

"I only knew that they had gotten possession of a cow for which they were to give certain notes which they had not given.

"Q. Well, then, what other things did Mr. Denny disclose to you other than what you have put in this letter to Mr. Love?
A. He told me that, after the sale, some one, we presume your client, or Love, had gone secretly and taken away the cow without his consent or authority.

"Q. And you said that the cow was taken away, some one said something about secretly—was that your own word? A. No, I got that impression from what Denny told me. The cow was taken away without his consent or knowledge.

"Q. Or authority? A. Or knowledge, even.

"Q. Now, were there any other circumstances explained to you by Mr. Denny regarding what took place at the sale, and as to the makers of that note? A. I cannot recall it.

"Q. You do not recall any? A. No.

"Q. Do you recall Mr. Denny telling you about conversations that occurred between the barn and the store the day of the sale? A. I do not.

"Q. You do not recall any. Did you, at the time this letter was written, December 17th, 1928, know that Denny had discounted this note at the bank? A. I did not.

"Q. Were you ever asked to advise what should be done in this case if a *bonâ fide* bargain had been made for the sale and purchase of the cow? A. No, I was not asked to advise on that.

"Q. Did you know, when you were advising Mr. Denny with regard to this at any time, that it was arranged between him and Mr. Love that Love's note, however made or endorsed, was to be taken to Mr. Beacock's store and delivered, and the cow taken at the time? A. I did not understand that.

"Q. You did not understand that? A. No.

"Q. Were you asked by Mr. Denny to advise on whether Whitter had agreed to go on the note or not? A. I do not recall Whitter's name ever being mentioned.

"Q. You do not recall Whitter's name ever being mentioned? A. No."

The magistrate (Mr. Willis) was examined and in answer to questions from his Lordship he says:—

"Q. Were you told that Love was contending that he had given the only promissory note that he was required by Denny to give? A. No, I do not think so.

"Q. Were you told that he was contending that a guarantee had been given at the sale of this cow, and that the guarantee had not been fulfilled? A. I was told that Love had bought a cow, and Mr. Denny had refused to take his note and what security was offered there at the sale, and that Mr. Denny had left the cow at the place of sale, and Mr. Love was to go and have some person, I think the father of Mr. Love, back this note before he could get the cow.

"His Lordship: Is the jury hearing?

"A. And that he had got the cow without having the note endorsed by him.

"Q. Yes? A. He had got the cow.

"Q. Were you told that Love was contending he had given the kind of note he had promised to give? A. No, I think not.

"Q. Namely, a note endorsed by Whitter? A. No, I think not.

"Q. Were you told that Love was contending that he had given a guarantee with the cow, and that the guarantee had not been kept? A. No."

The evidence which I have quoted convinces me that Denny failed entirely to lay before his counsel or before the magistrate

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a full and fair statement of all the facts; and consequently he is not protected by the advice and direction which he received.

On the point as to whether the defendant had a *bonâ fide* belief that the plaintiff had stolen his cow, I refer to the evidence of the defendant himself. The warrant was issued on the 16th January, 1928. A day or two before the 12th January, the defendant Denny drove out with one Whippey to Love's farm, where the cow was, and Denny's account of the interview is as follows:—

"I asked him what he was going to do, and I said I had come out to see about the settlement for this cow. He said he was not going to do anything. He said I could either take his note or nothing.

"Q. Well, Mr. Love has said the first thing you said was, 'I am going to have you arrested?' A. It is not true.

"Q. Go on and tell us—did you say that at any time? A. No, I did not say that at any time. I said to him that my solicitor had instructed me, if he did not settle, I could arrest him.

"Q. Had you a solicitor who instructed you that? A. Yes, he had told me that, and so, Mr. Love, he began to complain about the cow. I asked him what was the matter with the cow. He said, 'She is not in calf.' With that Mr. Whippey and I went in the stable and seen the cow, and I am used to handling a great many cows, and I went and felt the cow and I could feel the calf quite plain. I said, if she was not in calf I take her away, and we knew she was in calf.

"Q. And the reason you commenced these proceedings then was to secure your debt? A. Because I did not get the agreement I was to get.

"Q. To secure your debt—if Love had settled, if Love had paid you the money the day you and Mr. Whippey went to his farm, that would have been the last of it?

"Q. You thought that is all you should do, so that the proceedings you instituted then before the magistrate were for the purpose of getting your money? A. That was acting on instructions of my solicitors.

"His Lordship: No, no, you must answer that question, witness.

"Mr. Gregg: Q. The proceedings you took in the magistrate's office were for the purpose of collecting the note? A. Of paying the money, either pay the money, or return the cow, or give satisfactory security.

"Q. You admitted to my learned friend that, when you were at Love's farm, you did make some mention of arrest to Love?

A. I mentioned what my solicitor had told me I could do.

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"Q. That is your story. Your solicitor had told you what you could do, and you passed that on to Love? A. Yes, I did.

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"Q. Now, you say this note was left on the sideboard at home? A. Yes, it was.

"Q. After you got the note back, finally, did you take it to the bank again? A. After the trial here, it was handed to them.

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"Q. You took it to the bank again? A. I won't say I did.

"Q. You knew of it being taken there? A. Yes.

"Q. You approved of it being taken there, and it was afterwards paid? A. It was afterwards paid. There was different payments, I think."

This is the evidence which leads me to the conclusion that I have expressed above.

Some question is raised regarding the legality of the course adopted at the trial by the Judge below in reserving his determination of the question of reasonable and probable cause until after the jury had passed on the question of malice.

Without expressing any opinion on the power of a trial Judge to adopt such a procedure, I am clearly of opinion that it affords no valid ground of objection to the judgment in question.

It is settled law that while absence of reasonable and probable cause cannot be inferred from the most express malice (*Johnstone v. Sutton* (1786), 1 T.R. 510, at p. 545), yet malice may be implied from the want of reasonable and probable cause if the jury agree with the judge that the facts establish this: *Quartz Hill Gold Mining Co. v. Eyre* (1883), 11 Q.B.D. 674, at p. 687; *Hicks v. Faulkner* (1878), 8 Q.B.D. 167; *Scott v. Harris* (1918), 14 Alta. L.R. 143.

In the present action the circumstance that the case went to the jury on the question of malice without any prior determination by the trial Judge as to the absence of reasonable and probable cause might have operated to the advantage of the defendant. It certainly could not result to his disadvantage with the jury, and any objection by him on this ground cannot be maintained.

With respect to the suggestion put forward by counsel for the appellant that the trial Judge failed to rely on his own judgment in determining the question of reasonable and probable cause, a perusal of the reasons of the learned trial Judge make it plain that he exercised his own judgment and discretion, and arrived at the conclusion at which he did arrive, namely, absence of reasonable and probable cause, by an independent consideration himself of all the circumstances.

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The authorities to which I have already referred above make it plain that the same facts and circumstances which are relevant to the question of reasonable and probable cause are also relevant and may be considered by the jury in determining the question of malice. This consideration appears to me to dispose conclusively of the objection raised by the appellant's counsel.

The other objections to the procedure at the trial appear to me to be trivial and not such as to warrant any interference on the part of this Court.

I may also observe that the only relief sought by the notice of appeal was a dismissal of the action, the appellant neither in his notice of appeal nor on the oral argument asking, so far as my recollection and my notes shew, that he might be awarded a new trial.

The case of *Cunningham v. Evans* (1919), 13 Sask. L.R. 120, is very similar in its legal aspects to the present case. It is a decision of a single Judge, and in any case would not be binding upon the Courts of Ontario, but it supports the view of this case at which I have arrived, and more particularly with respect to the *bonâ fide* belief of the defendant when swearing out the information. At p. 123 the Judge says:—

"In no place in his evidence does the defendant say he honestly believed the plaintiff stole the granary, and I cannot come to that conclusion on his evidence. In fact, on the contrary, he admits he laid the information in order to get back the granary. He practically admits he resorted to the criminal law to obtain the granary, and, in my opinion, that is an improper motive amounting to malice."

The appeal should be dismissed with costs.

FISHER, J.A., agreed with MASTEN, J.A.

LATCHFORD, C.J.:—Having had the privilege of perusing the opinion of my brother Masten, I fully agree in the conclusion at which he arrived. I only wish to add that, in my opinion, the Judge in an action for malicious prosecution should, before submitting anything to the jury, decide all questions of law and fact necessary for determining whether or not there was reasonable and probable cause for the prosecution. Not otherwise, I think, can sec. 63 of the Judicature Act* be properly complied with. According to the dictum of Chief Justice Sir William Meredith in *Jewhurst v. United Cigar Stores Ltd.* (1919),

* 63. In actions for malicious prosecution, the judge shall decide all questions both of law and fact necessary for determining whether there was reasonable and probable cause for the prosecution.

46 O.L.R. 180, at p. 186, the question is to be determined by the Judge for all the purposes of the trial. The whole responsibility on the point is his and his alone. As it cannot properly be inferred from any finding of fact made by the jury, the decision as to reasonable and probable cause should be made and announced before the jury is called upon.

MAGEE, J.A., agreed with LATCHFORD, C.J.

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Appeal dismissed with costs.

[APPELLATE DIVISION.]

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June 26.

Insurance (Automobile)—Insurance Act, R.S.O. 1927, ch. 222, sec. 175, condition 5—"Age-limit Fixed by Law"—Highway Traffic Act, R.S.O. 1927, ch. 251, secs. 16, 43, 66—Authority of Decisions—Judgment of Divided Appellate Court—"Concurrence" in Departing from—Judicature Act, R.S.O. 1927, ch. 88, sec. 31 (1).

The judgment of RANEY, J., 63 O.L.R. 310, was affirmed upon appeal to a Divisional Court.

Yorke v. Continental Casualty Co. of Canada (1929), ante 109, followed.

The decision of a Divisional Court, though the result of an equal division of opinion, is, by the Judicature Act, sec. 31 (1), binding on another Court of co-ordinate jurisdiction, and must be followed unless it may be departed from by the concurrence of the Judges who gave the earlier decision; and the direction of the Divisional Court which gave the earlier decision that the appeal in the present case should be dealt with by another Divisional Court did not constitute a "concurrence," within the meaning of sec. 31 (1).

And, apart from the case followed, the Court approved the decision of RANEY, J.

An appeal by the Ocean Accident and Guarantee Corporation, third party, from the judgment of RANEY, J. (1928), 63 O.L.R. 310.

May 28. The appeal was heard by LATCHFORD, C.J., MAGEE, MASTEN, ORDE, and FISHER, JJ.A.

R. S. Robertson, K.C., and J. W. Pickup, for the appellant corporation, argued that the learned trial Judge should have held that, at the time of the accident, the defendant's automobile was, with the knowledge, consent, or connivance of the defendant, being driven by a person "under the age-limit fixed by law," within

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the meaning of statutory condition 5, forming part of the insurance policy. The boy-driver had no chauffeur's licence, and, being under the age of 18, was prohibited from driving, 18 being the age-limit fixed by law in his case: *Brock v. Travellers Insurance Co.* (1914), 88 Conn. 308; Simpson's Law relating to Automobile Insurance, 2nd ed., p. 338.

Charles Weir, for the defendant, respondent, contended that the only age-limit fixed by law was 16 years; and, as the boy-driver was over 16 at the time of the accident, the insurance company could not invoke statutory condition 5 to relieve it from liability. Sixteen is the only age-limit, and, being between 16 and 18, this boy-driver was only in default in respect of regulation, that is, he had not a chauffeur's licence. Reference to the definition of the word "limit" in the concise Oxford Dictionary; *McClure v. General Accident Insurance Co. of Canada*, [1925] 3 D.L.R. 133. Further, this Court was bound by the decision of the First Divisional Court in *Yorke v. Continental Casualty Co. of Canada* (1929), *ante* 109, and the fact that the First Divisional Court had referred this appeal to this Court did not make the *Yorke* case the less binding. Reference also to *Driscoll v. Colletti* (1926), 58 O.L.R. 444; Barron's Canadian Law of Motor-Vehicles, p. 372. Also, the learned trial Judge should have held that the insurance company was estopped by its conduct after the accident from setting up a breach of the statutory condition.

Robertson, K.C., in reply, contended that there was no estoppel, and urged also that the Court was not bound by any previous decision of the First Divisional Court, which had sent this appeal to this Court for the purpose of having the questions at issue determined.

June 26. *LATCHFORD, C.J.*:—This appeal is from the judgment of Raney, J., of the 29th November, 1928, awarding the plaintiff damages of \$3,500, with relief over for the same amount against the third party.

The question in dispute is whether a condition of the policy, alleged by the appellant to exempt it from liability, is applicable in the circumstances of this case. By that condition liability is said to be excluded where the car of the assured is driven by a person "under the age-limit fixed by law."

In the recent case of *Yorke v. Continental Casualty Co. of Canada*, *ante* 109, the First Divisional Court decided that such limit is 16. As the driver of the respondent's car was over 16 years of age, he was not under the age-limit fixed by law as determined by a Court of co-ordinate jurisdiction with this Court.

Although the decision is the result of an equal division of opinion, it is, by the Judicature Act, R.S.O. 1927, ch. 88, sec. 31(1), binding on this Court in the absence of the concurrence of the Judges who gave the decision, and such concurrence has not been yielded. The law must be held to be as the First Divisional Court decided until reversed by a higher court.

Accordingly, the appeal fails and must be dismissed with costs.

MAGEE, J.A.:—The Ocean Accident and Guarantee Corporation appeals from the judgment holding it liable as third party to the defendant under its policy of automobile insurance to pay him \$3,500, the amount which the judgment awards against him to the plaintiff for damages caused to the plaintiff by the defendant's motor-car negligently driven on a highway by the defendant's son, aged 17 years. The company appeals because its policy contains a clause that the company shall not be liable thereunder while the automobile, with the knowledge, consent, or connivance of the insured, was being driven by a person under the age-limit fixed by law, or in any event under the age of 16 years.

The policy is dated the 30th July, 1927, and the plaintiff sustained the injury on the 10th September, 1927.

The Highway Traffic Act of 1923, 13 & 14 Geo. V. ch. 48, by sec. 44(1), as amended in 1925 by 15 Geo. V. ch. 65, sec. 19, enacted that no person under the age of 16 years should drive or operate a motor-vehicle, and no person over the age of 16 years and under the age of 18 years should drive or operate a motor-vehicle on the highway unless and until such person had passed an examination and obtained a licence as provided by sec. 17 of that Act of 1923. Subsection 2 of the same section, 44, also forbade the employment or permission to do so.

Section 17 provided that no person should operate or drive a motor-vehicle on a highway as a chauffeur unless licensed so to do, and no person should employ any one to drive a motor-vehicle who was not a licensed chauffeur—and a licence should not be issued to a chauffeur unless he filed certificates of his fitness, having regard to his character, physical fitness, ability to drive, and knowledge of the rules of the road, the certificate as to character to be furnished by a specified official in his municipality, and that as to the other qualifications to be furnished by an official examiner appointed under the Act. "Chauffeur" was defined in sec. 2 as any person who operates a motor-vehicle and receives compensation therefor. As worded before the amendment of 1925, sec. 44 had required "a licence as provided in this Act for a person who drives or operates a motor-vehicle for hire, pay or gain." The

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provision of sec. 44(1) itself had in 1917 (by 7 Geo. V. ch. 49, sec. 10) taken the place of R.S.O. 1914, ch. 207, sec. 13, which forbade any one under the age of 18 years to drive a motor-vehicle.

The Act of 1925 amended the Act of 1923 in other respects, and by sec. 20 added sec. 69, whereby no person other than one holding a chauffeur's licence shall operate or drive a motor-vehicle on a highway unless he holds an operator's licence issued to him under that section, whereby operators' licences might be issued to such persons for such times and upon such terms and conditions and subject to such regulations and restrictions as the Lieutenant-Governor in Council might prescribe.

Under sec. 44, therefore, the defendant's son, being under the age of 18 years, was prohibited from driving the motor-vehicle unless and until two requirements were complied with. These were the passing an examination and obtaining a licence. The former necessitated the existence of something in himself, the ability to pass an examination, the latter would be the discretion or power of action of some one else, which might or might not be exercised in his favour. The one was intrinsic and the other extrinsic.

As regards the existence or non-existence of a licence, that may, I think, be disregarded. A licence is required for every one who operates or drives a motor-vehicle, and it could not well be said that because a man of 40 years had not a licence he was under the age-limit fixed by law, nor could it be said that a chauffeur of that age driving for hire without a licence was under the age-limit.

We then have to deal with the other requirement, passing the examination. The defendant's son had, when 16 years old, passed the examination called for by sec. 17, but he had not obtained a licence. It is not shewn, though suggested, that such an examination has to be passed yearly or more than once. Having passed it, and the element of licence being eliminated, he ceased to be under the age-limit fixed by law, and so the clause relied on by the company does not apply.

A limit is not the less a limit because it is irregular. If the Act had provided that no person over the age of 16 and under the age of 18 years should drive a motor-vehicle unless such person were a male or unless such person were Canadian born, the defendant might well concede that a girl of 17 or an English-born boy of 17 would be under the age-limit fixed by law, although the law also provided that no one under 16 years old should drive a motor-vehicle. But we have not to deal with such a case of want of intrinsic qualification. And the entire absence of a licence to the

defendant's son and consequent illegality of his driving is not the question at issue.

I would dismiss the appeal.

ORDE, J.A.:—This appeal involves the liability of the third party to the defendant upon a claim for indemnity.

The action was for damages for injuries suffered by the plaintiff as the result of the negligence of the driver of a motor-car owned by the defendant. The defendant denied liability, but brought in the Ocean Accident and Guarantee Corporation as a third party, claiming to be indemnified against liability in respect of the plaintiff's claim under a policy of insurance insuring the defendant, among other things, against all loss or damage which the defendant should become legally liable to pay for bodily injury to any person caused by the ownership, maintenance, or use of the defendant's automobile.

The third party relies in its defence to the claim upon the statutory condition number 5, forming part of the policy, which is as follows:—

"5. The insurer shall not be liable under this policy while the automobile, with the knowledge, consent or connivance of the insured, is being driven by a person under the age-limit fixed by law, or, in any event, under the age of 16 years, or by an intoxicated person."

At the time of the accident the defendant's motor-car was being driven by his son, who was then over the age of 16 years but under the age of 18.

The learned trial Judge gave judgment in the action for the plaintiff against the defendant, and upon the third party issue, for the defendant against the third party. From that judgment the third party now appeals.

The appeal came on for hearing before the First Divisional Court of the Appellate Division, and was, so we are informed, directed by that Court to be heard before the Second Divisional Court, by reason of the equal division of opinion expressed in the recent case of *Yorke v. Continental Casualty Co. of Canada*, ante 109. With one slight distinction (though possibly an important one) that case presented the same problem as this. In that case the accident occurred prior to the 1st July, 1927, on which day the amendment to the Highway Traffic Act requiring every person operating or driving a motor-vehicle (other than licensed chauffeurs) to obtain an operator's licence came into force. That amendment was passed in 1925 by 15 Geo. V. ch. 65, sec. 20, but, by 16 Geo. V. ch. 58, sec. 15 was only to come into force on a day

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to be named by the Lieutenant-Governor in Council. The 1st July, 1927, was subsequently named as the day.

Section 43 of the Highway Traffic Act, R.S.O. 1927, ch. 251, absolutely prohibits any person under the age of 16 years from driving or operating a motor-vehicle, and likewise prohibits any person over the age of 16 and under the age of 18 from driving or operating a motor-vehicle on a highway unless and until he has passed an examination and obtained a chauffeur's licence under sec. 16. That was also the law prior to the 1st July, 1927. So that prior to that date those under 16 were absolutely prohibited from driving, those over 16 and under 18 might drive if they obtained a chauffeur's licence, and those over 18 required no licence. Since that date the same prohibitions and regulations are applicable to those under 16 and under 18 respectively, but those over 18 require an operator's licence.

The accident in the present case occurred on the 10th September, 1927, and there is that difference between the two cases, but there was no change in the law requiring drivers over 16 and under 18 to obtain a chauffeur's licence. If the law which now requires all others to obtain an operator's licence in any way distinguishes this case from the *Yorke* case, the distinction bears against the insurance company and not in its favour.

It is urged that, notwithstanding the direction of the First Divisional Court that this appeal should be heard before this Court, we are bound by the *Yorke* case. There can be no doubt that under the ruling in *Driscoll v. Colletti*, 58 O.L.R. 444, we are bound by the decision (that is, the effective decision, which is the affirmance of the judgment appealed from) of an equally divided Divisional Court, unless the circumstances under which the appeal comes before us bring it within the concluding words of subsec. 1 of sec. 31 of the Judicature Act, R.S.O. 1927, ch. 88, which declares that "the decision of a Divisional Court on a question of law or practice . . . shall be binding . . . and shall not be departed from in subsequent cases without the concurrence of the Judges who gave the decision."

Does the mere direction by one Divisional Court that an appeal shall be heard by the other Divisional Court constitute a "concurrence" within the meaning of this section? In the first place, it may perhaps be doubtful whether "the concurrence of the Judges who gave the decision" means merely a permission to deal with the question afresh, whatever the conclusion may be, or a positive agreement as a matter of opinion in a departure from the earlier decision. I am inclined to the view that it means the latter, and that it is necessary that those Judges upon

whose judgment the earlier decision rests must concur in the departure therefrom; otherwise there might be some extraordinary consequences. It happens in the present case that the judgment appealed from is against the insurance company and that five Judges heard the appeal. Had the trial judgment been the other way, and only four Judges sitting, what would be the effect of another equal division of opinion? That danger was of course safeguarded in the present case by having five Judges hear this appeal. But what I have suggested is theoretically and technically possible if the question of law is to be merely permitted by one Divisional Court to be dealt with anew by another. I think that "concurrence" means a concurrence in what is in effect a judgment overruling the earlier decision.

It is to be noted that the concurrence is that of "the judges who gave the decision," not that of the Court which gave it. Whether this means all the judges or merely a majority of them need not be discussed. In the present case I know that one of the Judges who gave the decision in the *Yorke* case and who was not sitting in the First Divisional Court on the day when this appeal was sent on to the Second Divisional Court, has stated that he neither concurs in the question being re-opened nor in any judgment departing from his judgment.

I am of the opinion, therefore, that, notwithstanding the direction by the other Division that this appeal should be dealt with by this Division, we are bound by the decision in the *Yorke* case and that the appeal ought to be dismissed upon this ground.

On the merits of the question, which was fully argued before us, I agree with the learned trial Judge. The condition frees the insurer from liability while the automobile is being driven by a person under the age of 16 years, whether such person is permitted by law to drive or not either with or without a licence. But it is argued that the defendant's son, though over 16 years, was none the less prohibited from driving by reason of the fact that he was under the age of 18 and that the automobile was "being driven by a person under the age-limit fixed by law," because it was unlawful for him to be driving at that age without a chauffeur's licence. But it was the absence of the licence that disqualified him from driving and not his age, and he was, under the change in the law which had become effective only a few weeks before the accident, in very much the same position as any other person over 18, the only difference being that the other required an operator's licence, while he was obliged to obtain a chauffeur's licence.

As pointed out by the learned trial Judge, the statutory condition number 5 is not only an Ontario statutory condition but a

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Dominion one and is obviously framed to meet the situation arising under the laws of any of the Provinces. The condition is designed to protect the insurer when the automobile is driven by a person under the age-limit fixed by law, whatever that age may be, but in no case, whether such age-limit is above or below 16, is the insurer to be liable if the car is driven by a person under 16. In this Province the age-limit is 16. Under that age no one may drive a car. Over that age he must obtain either a chauffeur's or an operator's licence. It is argued that without a chauffeur's licence a boy over 16 and under 18 is prohibited from driving by the age-limit of 18, but it is not his age but the absence of the licence which makes it unlawful for him to drive.

If the age of 18 is to be regarded as "the age-limit fixed by law," then to give to the condition its full and logical effect it would be applicable whether the boy has a chauffeur's licence or not; he is still under the age-limit. If the insurer attempts to answer this argument by stating that, having obtained a chauffeur's licence, the driver then ceases to be under the age-limit, he at once cuts the ground from under his feet, because it then becomes plain that it is not the boy's age but the absence of a licence which makes it unlawful for him to drive. If 18 is the "age-limit," then it is immaterial whether the driver is licensed or not. The insurer does not claim any such strict construction. But to be effective the claim must go that far. Falling short of that, the question becomes one of licence or no licence, and the condition does not apply.

The appeal should be dismissed.

MASTEN and FISHER, JJ.A., agreed with ORDE, J.A.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

ROGERS V. LABOW.

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April 12,
June 26.

Interest—Mortgage—Blended Payments—Non-compliance with sec. 6 of Interest Act, R.S.C. 1927, ch. 102—No Interest Recoverable by Mortgagee—Sec. 7 of Act.

Where a mortgage does not comply with sec. 6 of the Interest Act, R.S.C. 1927, ch. 102, the mortgagor is relieved from all liability for interest.

Re Brown (1928), 61 O.L.R. 602, followed.

The allowance of interest in *Lastar v. Poucher* (1926), 58 O.L.R. 589, was *per incuriam*; and, in so far as that case and the two cases following it, *Prousky v. Adelberg* (1926), 59 O.L.R. 471, and *Thompson v. Wilson* (1927), 32 O.W.N. 317, sanctioned the allowance of any interest, they must be taken to be overruled by *Re Brown*.

The rights of the parties in the present case were governed by sec. 6, and sec. 7 had no application.

AN appeal by the defendant from the report of an Assistant Master in a mortgage action.

April 10. The appeal was heard by RANEY, J., in the Weekly Court, Toronto.

M. C. Pritchard, for the defendant.

R. L. Webster, for the plaintiff.

April 12. RANEY, J.:—The question is, whether a mortgagor is relieved from all liability to the mortgagee for interest because of non-compliance of the mortgage with sec. 6 of the Interest Act, R.S.C. 1927, ch. 102.

The section in question, so far as it has a bearing on the case before the Court, reads as follows:—

“Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on any plan under which the payments of principal money and interest are blended no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement shewing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly.”

The mortgage, which was made by the defendant in October, 1923, in favour of the plaintiff, against lands in the township of Scarborough, is for \$800, payable in five years with interest at 8 per cent. half-yearly. It is now admitted that the actual principal money was \$750, the extra \$50 having been added by way of bonus.

The mortgage being in arrear, a writ for foreclosure was issued, and there was the usual reference to take the mortgage-account. The Assistant Master found that the amount recoverable

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for principal was \$750, but declined to give effect to the argument of the mortgagor that the mortgagee was penalised by sec. 6 of the Interest Act so as to prevent him recovering a judgment for anything for interest.

The words "principal money" in sec. 6 have reference to the capital sum placed at interest, in other words to the sum actually lent or advanced; and the word "interest" as used in the section denotes compensation for the use of the principal, and applies as accurately to a lump-sum agreed to be paid by way of compensation as to periodical payments at a rate per cent.: *Singer v. Goldhar* (1924), 55 O.L.R. 267.

All the conditions to make sec. 6 of the Act applicable appear to be present here. The mortgage is on real estate; the so-called "principal sum" of \$800 is compounded of a blending of principal money, \$750, and interest (bonus) \$50; the mortgage does not contain a statement shewing the "amount of principal money" or "the rate of interest chargeable thereon" calculated yearly or half-yearly. True, the mortgage does contain what purports to be a statement of the principal money, that is to say, \$800, but it is not a correct statement of the principal money. True, too, that there is a rate of interest stated, but the rate of interest stated is not the correct rate, taking into account the fact that a part of the interest is by way of bonus.

If there were any doubt as to the true construction of the section, the doubt would be resolved by the judgment of the Appellate Division of this Court in *Re Brown* (1928), 61 O.L.R. 602.

The only argument put forward by counsel for the plaintiff to the contrary of the construction placed upon sec. 6 by *Re Brown* was the prior judgment in *Lastar v. Poucher* (1926), 58 O.L.R. 589. But an examination of that case shews that the only question in issue there was as to whether an agreement between the parties, which preceded the mortgage and provided for an increase of the actual principal by the sum of \$2,000, was really a bonus so as to bring it within the provisions of the Interest Act. In the *Lastar* case the mortgagor was content to pay interest at the rate stipulated in the mortgage on the moneys actually advanced, so that the penalising effect of sec. 6, in so far as the expressed rate of interest was concerned, was not under consideration by the Court.

Though one's sympathies may be, as those of the Assistant Master were, with the mortgagee, the case being squarely within the section, there is no alternative but to give it its full effect. The appeal will be allowed with costs, and the report will go back to the Assistant Master for revision.

The plaintiff appealed from the order of RANEY, J.

May 29. The appeal was heard by LATCHFORD, C.J., MAGEE, MASTEN, and FISHER, J.J.A.

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R. L. Webster, for the appellant, contended that secs. 6 and 7 of the Interest Act, R.S.C. 1927, ch. 102, are contradictory and the only reasonable interpretation of sec. 7 is that the interest rate properly shewn is chargeable "on the principal advanced," while that which is chargeable by virtue of the other provision is not recoverable; that the result in *Re Brown*, 61 O.L.R. 602, should be applied only to cases coming strictly in line with it; and the facts in *Re Brown* and in this case were quite different. Interest should be allowed on the amount of principal money advanced. Any other interpretation of secs. 6 and 7 would work hardship upon investors and open the door to frauds on mortgagees. In any event, the mortgagee is entitled as for the time when the mortgage is in default to recovery of interest at the rate of 5 per cent. Reference to *Lastar v. Poucher*, 58 O.L.R. 589; *Prousky v. Adelberg* (1926), 59 O.L.R. 471; *Thompson v. Wilson* (1927), 32 O.W.N. 317; *Canadian Mortgage Investment Co. v. Cameron* (1917), 55 Can. S.C.R. 409, 38 D.L.R. 428.

M. C. Pritchard, for the defendant, respondent, contended that, the mortgage blended \$50 bonus with \$750 principal and charged interest at 8 per cent. per annum on the total of \$800. The bonus was interest within the meaning of the Interest Act: *Singer v. Goldhar*, 55 O.L.R. 267. Therefore sec. 6 of the Interest Act applied, and no interest whatever could be recovered: *Re Brown*, 61 O.L.R. 602. The mortgage does not contain a true statement of the principal and the rate of interest; consequently sec. 7 of the Interest Act does not apply. Sections 6 and 7 are not contradictory. When a mortgage on a sinking fund plan has an additional explanatory statement of the principal and true rate of interest to comply with sec. 6, then sec. 7 simply gives the rule for computing the interest if the repayment clause and the explanatory statement conflict or produce different results. An example of this is found in *Canadian Mortgage Investment Co. v. Cameron*, 55 Can. S.C.R. 409. Section 7 settles the conflict between the two modes of calculation. *Lastar v. Poucher*, 58 O.L.R. 589, first came before the Assistant Master on a reference. The mortgagee claimed principal, bonus, and interest on principal and bonus. The mortgagors submitted to pay principal only. The Assistant Master allowed principal and interest thereon without bonus or interest on bonus. The mortgagee appealed against the disallowance of bonus and interest on bonus. The mortgagor did not cross-appeal against the allowance of interest on the principal. Therefore the decision of Hodgins, J.A., simply affirmed the Master's decision, that is, disallowed bonus and interest on bonus, but did not deal with

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the question of interest on principal brought up in the present case. The approval accorded to the decision in *Lastar v. Poucher* by the Court in *Re Brown* relates solely to the point that the substance and not merely the form of the transaction is to be regarded. *Prousky v. Adelberg*, 59 O.L.R. 471, decides that bonus and interest on bonus cannot be collected, but does not decide as to interest on principal when a bonus is charged, because the interest on principal was tendered by the mortgagor before action and was never disputed at any stage. *Thompson v. Wilson*, 32 O.W.N. 317, is overruled by *Re Brown*.

June 26. The judgment of the Court was read by MASTEN, J.A.:—Appeal by the plaintiff from the order of Raney, J., dated the 12th April, 1929, whereby he allowed the appeal of the defendant from the report of Assistant Master Drew. The action is for foreclosure of a mortgage dated October, 1923, made by the defendant to the plaintiff against lands in the township of Scarborough. The mortgage on its face purports to secure repayment of the sum of \$800 with interest at 8 per cent. per annum on the said sum of \$800. It is now admitted that the principal money advanced was \$750, and that the further sum of \$50, making up the \$800 appearing on the face of the mortgage, was and is a bonus, which, under the decision of this Court in *Singer v. Goldhar*, 55 O.L.R. 267, is interest.

The mortgage contains no statement shewing the amount of principal money advanced as being \$750 nor any statement of the rate of interest which was to be paid when computed on \$750, such interest being in fact made up of the \$50 bonus and \$32 half-yearly being 8 per cent. on \$800. There was no fraud. The defendant understood the situation and paid interest at the rate of \$32 half-yearly. But he now insists on his strict legal rights under the statute.

On the taking of the account in the Master's office the learned Master, for reasons stated by him, fixed the amount to be paid by the defendant in order to redeem at \$750, being the amount of principal money actually advanced and interest on \$750 at 8 per cent. The defendant appealed from this report, on the ground that, having regard to secs. 6 and 7 of the Interest Act, R.S.C. 1927, ch. 102, no interest whatever was chargeable, payable or recoverable, on any part of the principal money advanced. Raney, J., acceded to the defendant's contention and allowed the appeal.

Counsel for the appellant relies on the cases of *Lastar v. Poucher*, 58 O.L.R. 589; *Prousky v. Adelberg*, 59 O.L.R. 471; and *Thompson v. Wilson*, 32 O.W.N. 317.

And counsel for the respondent relies on *Re Brown*, 61 O.L.R. 602.

It is sufficient to point out that *Re Brown* is a decision of the First Divisional Court, by which we are bound, while the three earlier cases above referred to are decisions of single Judges, and must, unless there is a valid distinction, be taken as overruled by *Re Brown*.

I have been unable to distinguish the present case from the *Brown* case. There the question arose on the ascertainment before the Surrogate Court Judge of claims against the *Brown* estate. The claim was for money originally lent to *Brown* on a mortgage made in 1924. The actual advance was \$1,500, on which interest was payable at the rate of 12 per cent. per annum, together with a quarterly bonus of \$105. The question before the Court was complicated by the circumstance of the giving of a new mortgage in 1926, in substitution for the earlier mortgage and securing certain additional debts. The Surrogate Court Judge went back to the original transaction and reduced the claim on the 1926 mortgage to the amount originally advanced and the amount of the other subsequent claims accrued down to the date of the second mortgage—disallowing all interest and quarterly bonuses provided for in the first mortgage. On appeal, Mr. Justice Middleton, sitting in Weekly Court, reversed the Surrogate Court Judge and held that the mortgage of 1926 secured the amount of a settled account agreed in 1926 between the parties. On appeal to the Divisional Court, it was held that the evidence failed to establish a settled account in 1926, and the ruling of the Surrogate Judge was restored, disallowing interest and bonus *in toto*. I am unable to distinguish the *Brown* case from the case at bar, and, agreeing as I do with its conclusion, it is a satisfaction to have the authority of Hodgins, J.A., for stating that his present opinion is as stated in the *Brown* case and that the allowance of interest in *Lastar v. Poucher* occurred *per incuriam*. So far as I can ascertain, the contest in that case was principally directed to the question of allowance or disallowance of the bonus of \$2,000. *Prousky v. Adelberg* followed *Lastar v. Poucher*, and, moreover, the mortgagor appears to have raised no objection to the allowance of interest on the amount of principal actually advanced. *Thompson v. Wilson* simply followed the two earlier cases. In so far as these three cases sanction the allowance of any interest, they must be taken to be overruled by *Re Brown*.

Section 6 prohibits the allowance of any interest whatever on any part of the principal money advanced unless the mortgage contains a statement shewing the amount of such principal money (that is the amount of principal money advanced) and the rate of interest chargeable thereon. Neither of these requirements is here fulfilled. There is no statement that the amount of the

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principal money advanced was \$750, nor of the rate of interest (including bonus) chargeable on \$750. The total of interest and bonus payable during the 5 years was \$370 or \$72 per annum on an actual advance of \$750, or roughly 9 $\frac{3}{5}$ per cent., but there is no statement to that effect in the mortgage.

These facts bring the case squarely within the drastic provisions of sec. 6; and, while there has been no fraud and the whole situation was clearly understood from the beginning and has been acted upon for 5 years, and while one must sympathise with the plaintiff, yet the Court has no alternative but to give effect to sec. 6.

In the course of the argument reliance was placed by counsel for the appellant on sec. 7. I think the rights of the parties in the present case are governed by sec. 6, and that sec. 7 has no application here. That section can only apply where a rate applicable to the principal money advanced is stated but other provisions, calculations or stipulations, in the mortgage provide for a greater interest than the stated rate. For example, if the mortgage here in question had contained a statement that the amount of the principal money actually advanced was \$750, and that the rate of interest on it was 8 per cent., but the mortgage did provide for payment of \$800 and interest on \$800 or at 8 per cent., then the real rate of interest would have been 9 $\frac{3}{5}$ per cent., but under clause 7 interest would be allowed at 8 per cent. on \$750.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

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BRIGGS & TURIVAS INC. v. CANADIAN PACIFIC RAILWAY Co.

April 16.
June 26.

Costs—Taxation—Witness fees—Witnesses Examined on Commission Brought to the Trial and again Examined—Discretion of Taxing Officer—Rule 667—Appeal to Judge in Chambers and Further Appeal to Divisional Court—“Necessary and Proper for the Attainment of Justice”—Forum.

Upon taxation between party and party of the defendants' costs of the action under a judgment dismissing it with costs, the Taxing Officer disallowed as disbursements sums of money paid by the defendants for witness-fees and expenses to two witnesses brought from British Columbia to Ontario and examined at the trial, they having been also examined upon commission in British Columbia before the trial. Upon the defendants' appeal, a Judge in Chambers directed that the items should be allowed, and this was affirmed by a Divisional Court upon the plaintiffs' appeal.

Held, that the question, not being one of quantum or of fact upon conflicting evidence, was a question of the proper application of an established principle to undisputed facts, and an appeal lay from the Taxing Officer's ruling to a Judge in Chambers and from the decision of the Judge in Chambers to a Divisional Court (assuming that leave to appeal was obtained).

It was argued that the discretion of the Taxing Officer, having been exercised under Rule 667 in holding that the expenditure for evidence was incurred through overcaution, ought not to have been interfered with; but it was held, that the discretion was a judicial one and was wrongly exercised by the Taxing Officer.

The Taxing Officer must not consider whether costs incurred have been necessary having regard to the event, but whether they have been "necessary or proper for the attainment of justice" (Rule 667). *Bartlett v. Higgins*, [1901] 2 K.B. 230, applied.

Where a court of first instance has misapplied a principle to undisputed facts, and a first court of appeal has reversed that judgment, a second court of appeal should interfere with the judgment in the first appeal, only if clearly satisfied that it is erroneous.

Demers v. Montreal Steam Laundry Co. (1897), 27 Can. S.C.R. 537, applied.

Sembler, that where practicable it is desirable that an appeal of this nature should be heard in the first instance by the Judge who heard the case.

And held, that the defendants were entitled to the costs incurred both in taking the evidence of the two witnesses on commission and also in bringing them to the trial.

AN appeal by the defendants from the certificate of the Taxing Officer upon the taxation of the defendants' party and party costs of this action under the judgment of ROSE, J. (1928), 35 O.W.N. 139, dismissing the action with costs.

The appeal was heard by JEFFREY, J., in Chambers.

J. D. Spence, K.C., for the defendants.

M. L. Gordon, K.C., for the plaintiffs, respondents.

April 16. JEFFREY, J.:—This motion came before me by way of appeal from the certificate of Mr. MacGillivray, K.C., Taxing Officer at Toronto, on the taxation of costs of the defendants under the judgment of Mr. Justice Rose, dated the 2nd November, 1928, on the grounds set forth in the objections to the ruling of the said Taxing Officer brought in before him on the said taxation.

Briefly, the Taxing Officer disallowed on the taxation the sum of \$826.85 paid to one Frank Sawford and \$270.65 paid to one A. H. Jones, a total of \$1,097.50.

The action brought by the plaintiffs against the defendant company related to the classification of certain goods shipped to the plaintiffs over the defendants' line to Chicago; the plaintiffs contending that they were being charged freight rates for car-parts, whereas the material in question was, in fact, used for re-smelting purposes and useful only as scrap, so that the nature of the goods shipped and the condition of the same when received were of importance.

The witness Sawford was the engineer under whose direction the goods were shipped, and by whom they were inspected at the

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1929. time of shipment. He gave expert evidence regarding their condition with a view to establishing that the classification contended for by the defendant company was correct.

BRIGGS & TURIVAS INC. v. CANADIAN PACIFIC RAILWAY Co. The witness Jones, who was a car-checker in the employment of the defendant company, testified as to the making of the shipment and the conditions under which the goods had been stored prior thereto.

The plaintiffs claimed from the defendant company the sum of \$28,000 and interest thereon from the 27th February, 1924, the date of the issue of the writ.

Both of the aforesaid witnesses reside in British Columbia, and they were, together with certain other witnesses, examined in Vancouver under a commission issued by the defendant company for that purpose, though the names of neither of them appeared in the material on which the application for commission was made or in the order for the commission. Notwithstanding that the writ was issued in March, 1924, the action was not prosecuted, and proceedings had to be taken by the defendants to force it to trial, and the action was disposed of, as above stated, on the 2nd November, 1928, and then only after the defendants had moved to have the action dismissed for want of prosecution.

On the appeal to me it was not contended that the amounts which were paid to the aforesaid witnesses, if they were entitled, were excessive. The plaintiffs contended that they should not have been called at the trial, and relied upon the reasons given by the Taxing Officer for disallowing the aforesaid items.

The Taxing Officer in his reasons for disallowance in the certificate of taxation goes on to say: "I do not wish to be taken as laying down any hard and fast rule as to the calling at trial of witnesses from outside the jurisdiction who have already been examined under commission, and taxing as against an unsuccessful party the costs of so doing. . . . There are probably cases in which such a course would be justifiable, but, having had before me copies of the evidence on both occasions by the witnesses here in question, and having heard the argument of both parties, I do not think this is one of them. It is admitted that no attack was being made upon the veracity of either of these witnesses, and there is no contention that their personal attendance at the trial was necessary with a view to affording the Court an opportunity of observing their demeanour and passing upon their credibility. . . . Apart entirely from the ability of the defendants to secure their personal attendance, they might, in my opinion, very well have been examined under commission as a means of avoiding the very large expense involved in bringing them to the trial.

With regard to the witness Jones, it was urged that he was in a position to give evidence as to a subsequent shipment of certain of the goods involved in the action which took place after the execution of the commission, and to speak as to their condition at that time. At the trial he testified to the shipment in question. He gave no evidence as to the condition of the goods at the time. The making of such shipment was apparently not disputed, and at all events it was proved by another witness called by the defendants; consequently, I am unable to see that any particular importance attaches to the evidence given by the witness Jones, in that respect. For these reasons I have overruled the objections."

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Having carefully perused the material filed and the evidence taken at the trial, I have come to the conclusion that the items disallowed by the Taxing Officer should have been allowed.

On the hearing of the appeal, counsel for the respondents relied upon the reasons given by the Taxing Officer and also upon Rule 667.

It must be borne in mind that both these witnesses were beyond the jurisdiction of the Court, and, having regard to the delay of the plaintiffs in proceeding to trial in this action, I think the defendants were justified in having a commission issued to take their evidence. This evidence was taken, as before stated, in 1927, a year before trial.

Having regard further to the lapse of time between the taking of the evidence on the commission and the trial of the action, the defendants had a right to assume that the plaintiffs might, and possibly would, call witnesses to contradict Jones and Sawford.

The amount involved in the action was considerable, and it was necessary that the defendants should carefully prepare to meet the plaintiffs' case. They were not in a position fully to anticipate the same, or the evidence that might be given in support, and the question is, did their counsel, in having the aforesaid witnesses brought to the trial, act in a wise and prudent manner, having regard to all the circumstances, or was he overcautious in bringing them to the trial?

It must be borne in mind that the witness Sawford was the chief engineer of the Taylor Engineering Company of Vancouver, which company had been employed by the Imperial Munitions Board as agents for the plaintiffs, to ship the parts of the 600 Russian cars in question in this action from Vancouver to Chicago. He had personally inspected the material and taken charge of the shipment, and it is contended that he was the only person outside of the witness Jones who could give evidence as to the condition at the time of the shipment. Undoubtedly, they were necessary

Jeffrey, J. and material witnesses for the defendants, and I think that the
1929. bringing of them down to the trial was not overcautious, but was
a wise and prudent action on the part of the defendants' counsel,
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TURIVAS INC. particularly in view of the fact that the plaintiffs, appreciating the
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RAILWAY CO. probability call witnesses to contradict them at the trial.

It is further to be borne in mind that Frank McGunnigle, assistant general manager of the plaintiff company, on his examination for discovery, made the following answer to a question:—

"Q. 165. But if you are really making serious claim that this was so deteriorated by its three and a half years out there that it was not really fit for anything but re-smelting, well, of course, we will have to meet you? A. That is not going to be our point, but it will work in. That is not going to be our real point, but that will be worked in; we will bring that in."

The defendants had no evidence available, or knowledge of the condition of the goods at Chicago, and it was important that Sawford and Jones, who were the only witnesses to give evidence as to the condition at the time of the shipment, should be at the trial to meet this evidence if the same was given.

There is this further to be said in regard to the advisability of having the witness Jones in attendance at the trial. Since his evidence was taken on commission it appears he took charge of a shipment from Vancouver to Reval and Vladivostock, Russia, of parts for ten complete cars, and repacked the parts for shipment so that they could be re-assembled into cars on arrival in Russia. He further had charge and knowledge of the shipment of parts of 100 cars to Russia, and on the trial he gave evidence as to these shipments, the condition of the parts, also evidence to shew that the car-parts had been kept under similar conditions as to exposure as the parts of the 600 car-lot mentioned (the subject-matter of this action), and that the parts for the 110 cars to Russia were in good condition at the time of the shipment. It is quite evident why this evidence was given, namely, to enable the Court to infer that the parts in question, when shipped, were necessarily in good condition.

I am, as before stated, of opinion that, notwithstanding that the evidence of these witnesses was taken on commission, it would have been unsafe to proceed to trial without having them in attendance. They were necessary and material witnesses for the defendants, and, as before pointed out, the defendants were never in a position wholly to anticipate the plaintiffs' case. The evidence given by these witnesses, so far as the defendants knew, might have been contradicted at the trial. It was reasonable for them

to anticipate this, and I am of opinion that counsel in preparing for trial could not safely ignore this angle of the case and rest solely on the evidence taken on commission.

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It may be, as the Taxing Officer states, that the evidence of these witnesses given at the trial did not vary materially from the evidence given on commission, and I am rather inclined to think that he has allowed this view to influence his judgment in disallowing these items. With respect, he should have asked himself this question: Was it, having regard to all the circumstances in this case, an act of overcaution on the part of the defendants' counsel? And, if satisfied that counsel had acted in a prudent and cautious manner, he should have allowed the items in dispute.

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I think it proper in disposing of this appeal to say that I am of opinion that, so far as possible, appeals of this nature should be taken to the trial Judge. He, better than any one else, is in a position, appreciating as he must the nature of the case, the evidence that was given, and the effect of the same, to say whether or not it was necessary for a plaintiff or defendant to have witnesses at the trial whose evidence had been taken on commission.

The appeal is allowed with costs and the order will go directing the Taxing Officer to allow the defendants the items he disallowed.

The plaintiffs appealed from the order and decision of JEFFREY, J.

June 11. The appeal was heard by LATCHFORD, C.J., MASTEN, ORDE, and FISHER, JJ.A.

Gordon, K.C., for the appellants, argued that the expense of obtaining the evidence of A. H. Jones and Frank Sawford at the trial should not have been allowed, because these two witnesses had already been examined in Vancouver. The commission evidence was available at the trial; why duplicate it? Double costs should not be allowed. Other witnesses could have been obtained in Toronto who could have covered the same ground at much less expense. The learned Judge below should not have interfered with the Taxing Officer's discretion, which was a just and equitable one, in refusing to allow the costs in question: Rule 667. In any event, if the Court should see fit to allow the costs of obtaining the attendance of these two witnesses at the trial, the costs allowed upon their examination upon commission should be deducted.

J. Q. Maunsell, for the defendants, respondents, submitted that, as to getting evidence in Toronto instead of in Vancouver, Sawford was the only man on whom they could rely for evidence as to the deterioration of the goods. As to Jones, they did not know at the time of his examination that he would be available

App. Div. to give evidence at the time of the trial. They thought it was necessary to have Jones's evidence at the trial as to shipments of goods, after his evidence had been given on commission. Sawford's evidence as to deterioration was very important, and it was necessary to have him at the trial to answer things which the plaintiffs might have brought out. Rule 667 had not in any way been contravened. The Taxing Officer's discretion was not an arbitrary but a judicial one, and had been wrongly exercised. It was the condition of things, at the time of the decision to call the evidence, which determined whether the evidence was necessary, not the looking back after the trial was all over, and then thinking perhaps the evidence was unnecessary: *Elliott v. Canadian Pacific Railway Co.* (1888), 12 P.R. 593; *Lonergan v. Royal Exchange Assurance* (1831), 7 Bing. 725, 131 E.R. 280; *Duke of Beaufort v. Lord Ashburnham* (1863), 13 C.B.N.S. 598; *Bartlett v. Higgins*, [1901] 2 K.B. 230; *Boyle v. Rothschild* (1908), 16 O.L.R. 424; *Re Solicitors* (1912), 27 O.L.R. 147; *Re Solicitor* (1908), 12 O.W.R. 1074. Again, the Taxing Officer's discretion is only exercisable as to quantum, and here he has disallowed the whole item. Nor does the Taxing Officer's discretion apply here, because this is not a tariff item. Further, the plaintiffs chose the forum. It was also submitted that, in the peculiar circumstances of the case, the costs incurred both on commission and at the trial should be allowed.

June 26. MASTEN, J.A.:—This is an appeal by the plaintiffs from the judgment of Jeffrey, J., dated the 16th April, allowing an appeal by the defendant from the certificate of the Taxing Officer at Toronto, whereby in the taxation of party and party costs he allowed to the defendants sums of \$826.85 and \$270.65 in respect of witness-fees and expenses of witnesses brought from Vancouver, who had theretofore been examined in Vancouver on commission. The facts are fully stated by Jeffrey, J., and need not here be repeated.

The gravamen of the appellants' complaint is that the Judge below ought not to have interfered with the discretion exercised by the Taxing Officer, and counsel quotes Rule 667, which reads as follows:—

“Between party and party the Taxing Officer shall not allow the costs of proceedings:—

- (a) Unnecessarily taken;
- (b) Not calculated to advance the interests of the party on whose behalf the same were taken;
- (c) Incurred through overcaution, negligence or mistake; or

(d) Which do not appear to have been necessary or proper for the attainment of justice or defending the rights of the party."

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He argues that the discretion of the Taxing Officer having been exercised under that Rule in holding that the expenditure for evidence here in question was incurred through overcaution, such discretion ought not to have been interfered with.

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In my opinion the appeal must be dismissed. There is no question here of quantum, and the facts relating to the question to be determined are not in dispute. For the most part they appear from the evidence given by these witnesses at the trial and on the commission. Not being a question of quantum or a question of fact upon conflicting evidence, it follows that the question is one of law or perhaps more accurately the proper application of an established principle to undisputed facts. On that ground the decision of the Taxing Officer was plainly appealable to a Judge in Chambers, and (assuming that leave to appeal was obtained) to this Court.

While no hard and fast rule can be laid down in relation to the question here arising, and every case must depend on its special circumstances, yet the manner in which the question has been viewed by Judges of great experience is well illustrated by the case of *Bartlett v. Higgins*, [1901] 2 K.B. 230. That was a decision by the Court of Appeal in England, where the rule of practice is similar to our own. The case was argued by Bray, K.C., for the plaintiff, and by Rufus Isaacs, K.C., for the defendants, and the judgments were written by Lord Justice Collins and Lord Justice Stirling. At p. 240 Lord Justice Stirling says:—

"In my judgment, it is not correct to say that costs are not to be allowed simply because in the ultimate event they turn out to have been unnecessary. The taxing master must not consider whether they have 'been 'necessary' having regard to the event, but whether they 'have been necessary or proper for the attainment of justice'. . . . I cannot see that the costs here were incurred through 'overcaution, negligence, or mistake.'"

See also *Duke of Beaufort v. Lord Ashburnham*, 13 C.B.N.S. 598, and *Delaroque v. S.S. Oxenholme*, [1883] W.N. 227.

The discretion to be exercised is a judicial discretion; and, for the reasons stated by Jeffrey, J., to which I am unable to add anything of value, I think this judicial discretion was wrongly exercised by the Taxing Officer.

I should perhaps add further that upon this appeal the rule laid down by the Supreme Court of Canada in *Demers v. Montreal Steam Laundry Co.* (1897), 27 Can. S.C.R. 537, ought probably to be applied. In that case Taschereau, J., said: "It is settled

App. Div. law upon which we have often acted here, that where a judgment
 1929. upon facts has been rendered by a court of first instance, and a
 first court of appeal has reversed that judgment, a second court
 BRIGGS & of appeal should interfere with the judgment on the first appeal,
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 v. only if clearly satisfied that it is erroneous;" citing *Symington v.
 CANADIAN Symington* (1875), L.R. 2 H.L. Sc. 415. While that rule is in
 PACIFIC terms stated to relate to a judgment upon facts, yet I think it
 RAILWAY Co.
 Masten, J.A. equally applies to the misapplication of a principle to undisputed
 facts.

In any case, my view is that, for the reasons stated, the judgment of Jeffrey, J., is right, and I concur in the suggestion which is contained at the end of his judgment that where practicable it is desirable that an appeal of this nature should be heard in the first instance by the Judge who has tried the case and who is in a better position than any one else to form a judgment as to whether the expenditure complained of was justifiable or otherwise.

A suggestion was also presented to this Court that if the costs of bringing the witnesses here to the trial were allowed then the costs of their examination on commission should be disallowed. The commission was executed at Vancouver in March, 1927, and the trial of the action began in Toronto on the 29th October, 1928, and lasted five days. The witnesses in question were Sawford and Jones. The evidence of both these witnesses was distinctly important and the amount involved in the action was very large. Having regard to these facts, and particularly to the circumstance of the long delay which occurred in bringing the action to trial, I think that the defendants were justified in securing on commission the evidence of these two witnesses, and are entitled to the costs incurred both in taking their evidence on commission and also in bringing them to the trial. That I understand to be the order made by Mr. Justice Jeffrey, and in my opinion the appeal should be dismissed with costs.

LATCHFORD, C. J., and FISHER, J.A., agreed with MASTEN, J.A.

ORDE, J.A.:—I have read and carefully considered the judgment of Mr. Justice Jeffrey from which this appeal is taken, and, after applying to it the arguments advanced on behalf of the plaintiffs, I am unable to see any ground for disturbing it.

It was argued that the disallowance of the expenditure in bringing the two witnesses from British Columbia to Toronto by the Taxing Officer was justified under Rule 667, because it was

unnecessary and had been incurred through overcaution, and that the matter was one for the exercise of the Taxing Officer's discretion. The question was not one of amount, but whether or not it was a proper and prudent thing to bring the two witnesses to Toronto for the trial, when they had already been examined—with other witnesses not brought to the trial—upon commission. That question was not a mere matter of discretion, and was one which might quite properly be the subject of an appeal to a Judge experienced in the holding of trials. The action was somewhat unusual, the amount involved was large, the plaintiffs chose their forum; and, in my judgment, it might have been unwise not to have had the two witnesses present to give evidence, rather than to rely upon their commission evidence.

The deduction from the two items in question of the travelling expenses mentioned during the argument appears to have been made before Mr. Justice Jeffrey and to have been given effect to by him, and need not be further dealt with here.

The appeal should be dismissed.

Appeal dismissed with costs.

[RANEY, J.]

DENT v. USHER.

1929.

July 12.

Negligence—Motor-vehicles upon Highway—Collision—Both Drivers at Fault—Injury to Plaintiff in Vehicle Driven by Husband—Ultimate Negligence of Plaintiff's Husband—Failure of Action—Contributory Negligence Act, R.S.O. 1927, ch. 103—Contribution between Wrongdoers—Legislation Suggested.

The plaintiff was being driven by her husband in his motor-car along a highway when the car came into collision with the defendant's car, driven by himself, and the plaintiff was injured. In an action to recover damages for the plaintiff's injuries, it was found upon the evidence, by the trial Judge, that the drivers of both cars were at fault.

The negligence of the defendant consisted in starting to make a left-hand turn from the south side of the highway into a lane on the north side, without making sure that he had time enough to clear the west-bound traffic; he saw his mistake when it was too late, and had brought his car almost to a standstill when the impact came. The primary negligence of the plaintiff's husband was excessive speed. He did not see the defendant's car till he was 40 or 50 feet away, when, at his rate of speed, it was too late to avoid the collision. There was nothing to prevent him seeing the defendant's car if he had been looking:—

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TURIVAS INC.

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PACIFIC

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Held, that the accident need not have happened if the plaintiff's husband had been as vigilant as he should have been—he had the last clear chance to avoid the accident, and he did not avail himself of it, and therefore the action failed.

Engel v. Toronto Transportation Commission (1926), 59 O.L.R. 514, applied, notwithstanding that the present action was brought by one whose own negligence was not a contributing factor.

Suggestion for legislation in regard to the rule of law which prevents a tort-feasor from obtaining contribution from a co-tort-feasor and the interpretation of the Contributory Negligence Act which excludes from its operation cases where there is a finding of ultimate negligence.

AN action for damages for injury sustained by the plaintiff in a collision of motor-vehicles upon a highway.

The action was tried before RANEY, J., without a jury, at a Toronto sittings.

T. N. Phelan, K.C., and *J. P. Walsh*, for the plaintiff.

W. F. Kerr, K.C., and *J. E. Kerr*, for the defendant.

July 12. RANEY, J.:—The plaintiff and her husband were driving by automobile from Ottawa to Toronto on the provincial highway. At the village of Colborne they came into collision with an automobile that was being driven by the defendant. The road was straight and level and the pavement dry. It was broad daylight and there was nothing to prevent either party from seeing the other.

The plaintiff was severely injured.

As is usual in such cases, each party, in this case the plaintiff's husband and the defendant, places the whole responsibility on the other. On the evidence I am satisfied that both parties were at fault.

After the accident the plaintiff's husband charged the defendant with responsibility for the accident. Whilst not admitting responsibility, the defendant undertook to pay for the repairs to Mr. Dent's automobile, which was seriously damaged, on the assurance that that would be an end of the matter. I have no doubt that the defendant understood that he was making a full settlement with both the husband and the wife, and I think that is what the husband intended at that time. But he had no authority from the plaintiff, and later on it developed that her injuries were more serious than had been thought at the time of the accident. After the defendant had paid the cost of the repairs to Mr. Dent's automobile, this action was commenced.

The negligence of the defendant consisted in starting to make a left-hand turn from his own right of way on the south side of the highway into a lane on the north side of the highway,

without making sure that he had time enough to clear the west-bound traffic, whose right of way he was crossing. He saw his mistake when it was too late, and had brought his car almost to a standstill when the impact came. The primary negligence of the plaintiff's husband was excessive speed. He admitted 35 miles an hour; I think he was going faster than that.

If it were merely a case of negligence by the defendant and contributory negligence by the plaintiff, the case would be governed by *Canadian Pacific Railway Co. v. Smith* (1921), 62 Can. S.C.R. 134. In that case the accident was caused by the negligence of the railway company, and of the infant plaintiff's father, who was the driver of the automobile and with whom the plaintiff, his daughter, was driving.

There is, I think, in law, no more reason for identifying a wife with the negligence of her husband than a daughter with the negligence of her father, and in the case of an accident caused by the negligence of two persons, and causing injury to a third person, that person may look to one or other or both the wrongdoers. The relationship of the third person to one of the wrongdoers is not a factor. In this case the wife chooses not to look to her husband. Indeed she could not look to her husband if she wished to, because a wife cannot maintain an action for tort against her husband: *Phillips v. Barnett* (1876), 1 Q.B.D. 436; *Lellis v. Lambert* (1897), 24 A.R. 653.

But, notwithstanding the excessive speed of the Dent car, and notwithstanding the negligence of the defendant in starting to turn across its right of way, the accident need not have happened if the plaintiff's husband had been as vigilant as he ought to have been. He admitted that he did not see the defendant's car till he was 40 or 50 feet away, when, at the speed at which he was coming, it was too late to avoid the collision. There was nothing to prevent him from seeing the defendant if he had been looking. The defendant and his car were there, almost straight ahead of him, and with nothing between. The inference is that the plaintiff's husband was tired, or, perhaps, suffering from eye-strain incidental to the speed at which he had been travelling. At all events he had the last clear chance to avoid the accident and he did not avail himself of it.

Under these circumstances the plaintiff's husband could not have succeeded in an action against the defendant for damages for the injuries to his automobile.

But can the plaintiff succeed when her husband could not?

The negligence of the defendant was a *sine quâ non* of the accident, and on principle it appears to be reasonable that the

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Raney, J. defendant should be held at least partly responsible for damages suffered by a third person which would not have been suffered but for his wrongful act. But that appears not to be the law. The effect of the authorities is stated by Mr. Justice Middleton in *Engel v. Toronto Transportation Commission* (1926), 59 O.L.R. 514, 518, in these terms:—

“After all that has been written upon the subject of ultimate negligence, as it is sometimes called, or the doctrine of the last clear chance, as it is at other times called, not much can now be profitably said. In the gradual evolution of the law of negligence it has now been clearly determined that when an emergency arises by reason of the negligence of one party, a new duty is cast upon the other to do his best to avoid the consequences of the initial negligence, and, if there is a breach of that duty and disaster results, it is to be attributed solely to his failure and he alone is responsible.”

It is true that Mr. Justice Middleton was not speaking in that case of the rights of a third party, but the principle is, I think, the same whether the claim is by a person whose own negligence has been a contributing factor or by a stranger.

And I am partly reconciled to this view of the law, which exonerates the defendant from liability, by the fact that if he were liable at all he would be liable for the whole of the damages suffered by the plaintiff, and without right of contribution from her husband, whom I find to have been more at fault for the accident than the defendant. Such a conclusion would, under the circumstances of this case, be more difficult to explain to the man in the street than the total exoneration of the defendant.

The rule, since *Merryweather v. Nixan* (1799), 8 T.R. 186, 16 R.R. 810, which has prevented a tort-feasor from obtaining contribution from a co-tort-feasor, has often been the subject of adverse comment by the Judges, but it has become in the course of more than a century too firmly imbedded in the common law to be changed by the courts: *Esten v. Rosen* (1928), 63 O.L.R. 210, 214. Both the law of *Merryweather v. Nixan* and the interpretation of the Contributory Negligence Act, R.S.O. 1927, ch. 103, which excludes from the operation of the Act cases where there is a finding of ultimate negligence (*Walker v. Forbes* (1925), 56 O.L.R. 532), might well have the early consideration of the Legislature. Common Law ought to be reasonably consonant with common sense and justice; and, when the courts find themselves shackled by precedent and compelled to give judgments that cannot be defended on principles of equity, the law-making authority that can ignore precedent ought to intervene.

In my view of the case, it becomes unnecessary to assess the damages suffered by the plaintiff, or to apportion the degree of fault between the defendant and the plaintiff's husband. But, if I were dealing with these matters, I would fix the plaintiff's damages at \$3,000, and apportion the fault one-third to the defendant and two-thirds to the plaintiff's husband.

The action will be dismissed and there will be no costs.

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[ORDE, J.A.]

RAMSAY V. STEEL CO. OF CANADA LTD.

1929.

August 23.

Company—Shareholders—Ordinary and Preferred Shares—Dividends—Provisions of Letters Patent Incorporating Company—Construction—Ratable Equality—Certificates for Shares—Declaration as to Respective Rights of the two Classes—Estoppel.

The authorised capital of a manufacturing company incorporated in 1910 by letters patent under the Dominion Companies Act, R.S.C. 1906, ch. 79, was \$25,000,000, divided into 250,000 shares of \$100 each, of which 100,000 shares were to be created and issued as preference shares, and the letters patent provided that those shares when so issued should have preference and priority as follows: "(a) In case of liquidation, dissolution, or winding-up of the company, the holders of such shares shall be entitled to repayment in preference to ordinary shareholders of the amount of the par value of said shares and any arrears of dividends thereon, and also the net profits of the company which it shall from time to time be determined to distribute are to be applicable first to the payment of a fixed cumulative preferential dividend at the rate of 7 per cent. per annum on the capital paid-up on the said preference shares, and holders of such shares shall participate with the holders of the issued ordinary shares in the distribution of net profits after the holders of the ordinary shares shall have received dividends equal to those paid on the preferred shares; (b) no dividends shall be paid on the ordinary shares until after the company shall have created and have to the credit of a reserve fund a sum equal to at least one year's dividend on the then issued preference shares."

In an action by two persons on behalf of themselves and all other holders of ordinary shares against the company and two holders of preferred shares, representing themselves and all other holders of such shares, it was held, that, upon the true construction of the provisions of the charter above quoted, the preferred shareholders were not entitled to participate in any distribution of the net profits of the company in excess of their fixed cumulative preferential dividend at the rate of 7 per cent. per annum until the total dividends declared upon the ordinary shares since the incorporation of the company should be equal as to the rate thereof to that theretofore declared and paid upon the preferred shares.

The equality intended to be given to the ordinary shareholders before the preferred shareholders can participate is a ratable equality in

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dividends to all "those" theretofore "paid on the preferred shares" and not merely an equality to the particular preferred dividend then declared.

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Held, also, that the ordinary shareholders were not estopped by the special declaration as to the respective rights of the two classes of shareholders appearing in the company's share certificates.

Ontario Jockey Club v. McBride, [1927] A.C. 916, distinguished.

ACTION brought by Thomas Ramsay and Francis A. Magee, on behalf of themselves and all other holders of ordinary stock of the Steel Company of Canada Ltd., against the company originally and afterwards by amendment against James F. Rogers and George C. Coppley, on behalf of themselves and all other holders of preferred stock of the company, for declarations, injunctions, and other relief, based upon the allegation that the directors of the company had no right to declare and pay to the holders of preferred stock any dividend in excess of 7 per cent. per annum until such time as the company should have paid dividends upon its ordinary stock equal per share in amount to the dividends paid on its preference stock.

May 27. The action was tried before ORDE, J.A., without a jury, at a Toronto sittings.

R. S. Robertson, K.C., and *A. W. Holmested*, for the plaintiffs.
W. N. Tilley, K.C., and *C. F. H. Carson*, for the defendants.

August 23. ORDE, J.A.:—The action was brought originally by the plaintiffs, suing on behalf of all the holders of ordinary stock of the Steel Company of Canada Limited, against the defendant company alone, but by two orders the two individual defendants were added, and were authorised to defend the action for the benefit of themselves and all other holders of preference stock of the defendant company.

The action raises the question as to the right of the directors of the company to declare and pay to the holders of preferred stock any dividend in excess of 7 per cent. per annum until such time as the company shall have paid dividends upon its ordinary stock equal per share in amount to the dividends previously paid on its preference stock, all as I shall more fully hereinafter set forth.

The company was incorporated on the 8th June, 1910, by letters patent under the Dominion Companies Act (then chapter 79 of R.S.C. 1906), under the name of "Canadian Steel Corporation Limited." On the 22nd June, 1910, by supplementary letters patent, the company's name was changed to "The Steel Company of Canada Limited." The company's powers were extensive, being generally to manufacture and deal in iron, steel, and all other metals from the ore to the finished product thereof, and to

manufacture and deal in all goods, wares and merchandise, in which iron or steel or any other metal might be used. It was also given many other powers, some of a nature allied to the manufacture of iron and steel, and others quite outside what might be deemed within the limits of such a business, but nothing turns on this.

There were also most of the usual powers as to the acquisition of the business or the shares of other companies, etc. There was no express power to acquire the business or the shares of any particular named person or company.

The authorised capital was \$25,000,000, divided into 250,000 shares of \$100 each, of which 100,000 shares of \$100 each or \$10,000,000 in all were to be created and issued as preference stock, and it was provided that such preference stock "when so issued shall have preference and priority as follows:—

"(a) In case of liquidation, dissolution, or winding-up of the company, the holders of such shares shall be entitled to repayment in preference to ordinary shareholders of the amount of the par value of said shares and any arrears of dividends thereon, and also the net profits of the company which it shall from time to time be determined to distribute are to be applicable first to the payment of a fixed cumulative preferential dividend at the rate of 7 per cent. per annum on the capital paid-up on the said preference shares, and holders of such shares shall participate ratably with the holders of the issued ordinary shares in the distribution of net profits after the holders of the ordinary shares shall have received dividends equal to those paid on the preferred shares;

"(b) No dividends shall be paid on the ordinary shares until after the company shall have created and have to the credit of a reserve fund a sum equal to at least one year's dividend on the then issued preference shares."

The questions raised by this action turn upon the meaning and effect of the foregoing provision as to the dividends to which the holders of preferred and of ordinary shares are respectively entitled.

Immediately after the incorporation and organisation of the company in 1910, 64,963 shares of preferred stock, amounting to \$6,496,300, and 115,000 shares of ordinary or common stock, amounting to \$11,500,000, were allotted and issued, and all were fully paid. No further shares have been allotted or issued, but by supplementary letters patent, issued on the 16th November, 1928, a by-law dated the 22nd October, 1928, which was duly confirmed at a meeting of shareholders held on the 14th November, 1928, and a special shareholders' resolution duly passed at the

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Orde, J.A. same meeting, were confirmed. The effect of the by-law and shareholders' resolution, and of the supplementary letters patent confirming them, was firstly to subdivide the 100,000 authorised preference shares and the 150,000 authorised ordinary shares, of the par value of \$100 each, into 400,000 preference shares and 600,000 ordinary shares respectively with a par value of \$25 each, and then, secondly, to declare that the 600,000 ordinary shares of the par value of \$25 each should be converted into 600,000 shares without nominal or par value. Beyond the fact that every shareholder was to have one vote for each new share, whether preference or ordinary, held by him, no change in the relative rights attaching to the shares of the par value of \$100 as originally created was made—all such rights being expressly reserved and maintained.

The subdivision of each share into four new shares made no change in the paid-up capital of the company, no further stock being allotted or issued. The company's balance-sheet of the 31st December, 1928, which appears in its annual report for 1928 (part of exhibit 8), gives the issued capital stock as 259,852 of preference shares of \$25 each, amounting to \$6,496,300, and 460,000 ordinary shares of no par value, but as representing \$11,500,000 of paid-up capital, as before.

The business of the company appears to have produced a profit in every year since its incorporation, except the year 1914, when, after paying the interest on its bonds and the 3½ per cent. dividend upon the preference shares, there was left a deficit for that year of \$313,172.47. There were, however, accumulated profits sufficient to take care of this deficit and to leave at the end of 1914 the sum of \$1,258,430.58 at the credit of profit and loss account.

From the time the company commenced business on the 1st July, 1910, to the 31st December, 1927, dividends at the rate of 7 per cent. per annum upon the preference shares were duly declared and paid. These declarations and payments were made regularly from time to time having regard to the company's financial year (which corresponded with the calendar year), except that during 1914 only 3½ per cent. was declared. The remaining 3½ per cent. for that year was, however, duly declared and paid in 1916, as during that year the preference shareholders received 10½ per cent. For the six months between the 1st July, 1910, and the 31st December, 1910, the preference dividend was of course 3½ per cent. only. The total dividends to the preference shareholders for the 17½ years down to the 31st December, 1927, amounted therefore to 122½ per cent. or \$122.50 per share.

Upon the ordinary shares no dividends were declared until 1916. In that year and thereafter down to the 31st December, 1927, dividends were declared as follows: in 1916, 4 per cent.; in 1917, 6 per cent.; in 1918, 6 per cent.; and in each of the 9 years from 1919 to 1927, both inclusive, 7 per cent., or in all 63 per cent.; making a total percentage received by the ordinary shareholders during the same period of 17½ years 79 per cent., or \$79 per share.

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During the year 1928, three quarterly dividends of 1¾ per cent. each were declared and paid both upon the preference shares and upon the ordinary shares. These were for the first three-quarters of the year, that is, to the 30th September, 1928.

On the 19th December, 1928, the directors passed two resolutions declaring dividends upon the preference and ordinary shares respectively to be payable upon the 1st February, 1929, to shareholders of record at the close of business on the 19th January, 1929. Each resolution is in the same terms as to the respective classes of shares, and declares a dividend of 50 cents per share upon each of the new shares (that is, the shares as dividend under the supplementary letters patent of the 16th November, 1928) "for the quarter ending December 31st, 1928," and "an additional and further dividend of 18¾ cents per share." Multiplying each of these sums by 4, in order to bring the percentage up to that payable upon the old shares, the dividend so declared to each shareholder, preferred and ordinary, amounted to \$2.75 per share, or 2¾ per cent. This, added to the dividend of \$5.25 or 5¼ per cent. already paid in 1928 for the first three quarters thereof, made a total dividend of \$8 or 8 per cent. payable to each shareholder. This proposal to distribute to the preference shareholders a dividend of 1 per cent. in excess of the 7 per cent. cumulative preferential dividend fixed by the company's charter, without first paying to the ordinary shareholders what they claim they are entitled to by way of dividend, provoked this action.

The dividends covered by this resolution, though payable in 1929, are deemed to be declared as part of the business of 1928, being shewn in the balance-sheet for that year (as the last quarterly dividend in each of the company's previous business year had always been shewn) as a liability of that year's business.

With the circular letter to the shareholders of the 22nd October, 1928, calling the special general meeting to consider the proposed subdivision of the shares, etc., was sent a copy of a notice, stated to have been issued to the press, which among other things announced that the next quarterly dividend when declared, payable the 1st February, 1929, would be 50 cents per share on the pro-

Orde, J.A. posed new (or subdivided) shares, both preference and ordinary.
1929. This announcement brought about some correspondence between
the officers of the company and certain of the holders of ordinary
shares who protested against any increase in the rate of dividend
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STEEL CO. OF CANADA LTD. upon the preference shares, until the ordinary shareholders had
received what they termed "back dividends" or "cumulative divi-
dends" sufficient to make the total dividends paid upon the ordinary
shares, since the incorporation of the company, equal in per-
centage per share to the total received for the same period by the
preference shareholders.

Notwithstanding these protests, the directors, on the 19th December, 1928, passed the resolutions above mentioned, and on the 28th December, 1928, the plaintiffs launched this action.

The foregoing facts disclose all that is necessary to understand the issue raised between the two classes of shareholders, but the pleadings set up some other matters, as to which some evidence was given at the trial, which may or may not have a bearing upon its determination. Some of the matters so raised seem to me to have no relevancy to the point in question.

The statement of claim, in addition to a statement in substance of the facts which I have already recited, refers to the terms of the notice of the 22nd October, 1928, calling the special meeting of shareholders for the 14th November, 1928, and alleges, by the 6th paragraph thereof, that that notice "for the first time put the plaintiffs upon inquiry as to what were the legal rights of the holders of preference and ordinary stock of the defendant company as they then existed." By para. 7, they allege that they then procured a copy of the company's charter and "ascertained that the dividends on the ordinary shares of the defendant company were cumulative." Counsel for the plaintiffs did not, of course, suggest at the trial that a shareholder could rely upon lack of actual knowledge of the provisions of his company's charter as a ground for any relief either as against the company or as against a fellow shareholder.

Paragraph 7 further alleges the threat of legal proceedings to restrain any attempt by the company to "alter or affect the rights of the holders of ordinary stock to claim that dividends on the ordinary stock were cumulative and that arrears of dividends aggregating approximately 43½ per cent. must be paid on the ordinary stock of the defendant company before the holders of preference stock received dividends, *pro rata* with the holders of ordinary stock in excess of 7 per cent. per annum." The 43½ per cent. is the difference between the 122½ per cent. and the 79 per cent. above mentioned.

Paragraph 8 alleges that, at the instigation of the plaintiffs and with the consent of the defendant company (by which I presume is meant the consent of the directors or of the other shareholders at the meeting), and for the express purpose of preserving to the holders of ordinary stock whatever rights they then had in regard to the payment of arrears of dividends, the resolution proposed to be passed was altered to the form in which it was passed, and that it was so passed unanimously.

I cannot see the relevancy of these allegations. Whether or not the resolution in the form proposed by the directors might, if passed, have been prejudicial to the ordinary shareholders, is of no consequence now. It is the resolution actually passed that counts. No argument was put forward at the trial that the rights of the preference shareholders had been prejudicially affected by it.

Paragraph 10 alleges that the stock certificates theretofore issued are ambiguous and might be construed to imply that dividends on the ordinary stock are non-cumulative. This allegation in effect anticipated one of the defences set up by the defendants.

By paras. 12 and 13 it is alleged that according to its balance-sheet of the 31st December, 1927, the company had available for dividends, after making due allowances for depreciation and all similar items properly chargeable against profits, accumulated undistributed profits of \$10,898,684.74, and that the net earnings are sufficient to have enabled the company to have paid dividends equivalent to 7 per cent. per annum upon its ordinary stock since its incorporation after creating the reserve fund equivalent to one year's dividend upon the then issued preference shares, as required by the charter.

This statement as to the surplus shewn by the balance-sheet for 1927 is correct. The balance-sheet shews the allowance for depreciation, etc., before arriving at the amount above mentioned. The balance-sheet for 1928 shews a net surplus of \$12, 042,376.20.

The relief claimed by the plaintiffs is as follows:—

“1. An injunction restraining the defendant company from paying any dividend upon its preference stock in excess of 7 per cent. per annum until such time as the defendant company shall have declared and paid dividends upon its ordinary stock equal per share in amount to the dividends previously paid on its preference stock, having due regard, however, to the fact that for each ordinary share of the par value of \$100 as originally constituted there are now issued and outstanding four shares of ordinary stock having no nominal or par value and that their relationship to the preference stock has been maintained and preserved by each

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Orde, J.A. share of preference stock of the par value of \$100 as originally
1929. constituted having been converted into four shares of preference
RAMSAY stock, of the par value of \$25 each, and by the supplementary
v. letters patent creating such change.

STEEL CO. OF “2. An injunction restraining the defendant company from con-
CANADA tinuing to issue stock certificates for both its preference and ordi-
LTD. nary stock which incorrectly state the rights and limitations relat-
ing to both classes of stock as defined by the letters patent in-
corporating the defendant company and the letters patent sup-
plemental thereto.

“3. A declaration by this Honourable Court construing the said
letters patent and supplementary letters patent relative to the
rights of both the holders of preference and ordinary stock of the
defendant company with respect to the declaration and payment of
dividends on both of said classes of stock by the defendant com-
pany and directing that all of the holders of both of said classes
of stock of the defendant company and the defendant company
shall be bound thereby.

“4. Their costs of this action and those of the defendants James
T. Rogers and George C. Coppley to be paid by the defendant
company.

“5. Such further and other relief as to this Honourable Court
may seem meet and as the circumstances of the case may require.”

The material defences set up are two. It is alleged, firstly,
that the directors were entitled to declare the dividends they
did by the resolutions of the 19th December, 1928, “and that in
doing so they violated no rights of the ordinary shareholders;”
and, secondly, that each preference or ordinary stock certificate
issued by the company since its organisation “correctly described
the rights of the shareholders with respect to dividends in the
following language:—

“The preference shares carry a fixed cumulative preference
dividend payable out of the profits of the company applicable to
dividends at the rate of 7 per centum per annum on the capital
paid-up thereof. They rank both as to dividends and assets in
priority to all ordinary shares. If, after providing for the pay-
ment in any year of the dividend on the preference shares and any
balance due for cumulative dividends for preceding years, there
remain any surplus net profits, any and all such as are not in
the opinion of the directors required for the purposes of the
company will be applicable to dividends on the ordinary shares for
such year to the extent of but not exceeding 7 per centum on
the capital paid-up thereon when and as from time to time the
same may be declared by the directors. The remainder of any

such surplus net profits shall then be applicable to the payment of further dividends equally per share upon both the preference shares and the ordinary shares, but no dividends shall be paid on the ordinary shares until after the company shall have created and have to the credit of a reserve fund a sum equal to at least one year's dividend on the then issued preference shares, the whole as provided in the letters patent incorporating the company."

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And that the plaintiffs and all persons who since the organisation of the company have held either preference or ordinary shares "have accepted said stock certificates as correctly stating the rights of shareholders with regard to dividends."

In addition to the documentary evidence establishing the facts already related, certain by-laws of the company were put in, as to the issue and signing of stock certificates and as to the powers of the directors to declare dividends and otherwise. There is nothing in any of these additional by-laws which, in my opinion, affects the issue.

Evidence was given that all the present paid-up capital stock of the company issued in 1910 was allotted in payment for the assets of the businesses which were taken over and became the consolidated business of the company. Whether the assets so acquired came to the company in the form of property or as shares in existing companies, or partly of each, was not stated, but the form in which the assets were so acquired is of no consequence. It was stated that all the vendors got both preference and ordinary shares. As these shares passed into the hands of individuals, the preferred and ordinary shares could hardly have been held in quite the same proportions by the respective shareholders, having regard to the fact that there were issued 64,963 preference and 115,000 ordinary shares. So that the statement of the company's secretary that they all received both preference and ordinary shares must be taken in a general sense and not as indicating an allotment of preference and ordinary shares in the same relative proportions to each allottee. The shares have since been traded in and frequently transferred. The plaintiff Ramsay holds a large number of both preference and ordinary shares and has increased the holdings which he acquired when the company was organised. It was either given in evidence or stated by counsel that the policy of the directors is that of the preferred shareholders, and it is to be presumed that the latter also hold a sufficient number of ordinary shares to control the election of the board, because if all the ordinary shares were held by persons having no interest in the preferred dividends they could easily outvote the preferred class. So far as the past is concerned this is of no consequence

Orde, J.A. if the views of the defendants prevail, for in that case it will be
1929. impossible for any board of directors upon any future distribution
RAMSAY of profits to make up to the ordinary shareholders, even out of
v. accumulated profits, for the lean years that have passed without
STEEL CO. OF correspondingly increasing the dividends upon the preference
CANADA shares beyond 7 per cent. per annum. In other words, no matter
LTD. how large the future dividends may be, the aggregate percentage
paid since the incorporation of the company to the preferred class
will always exceed that paid to the ordinary class by at least 43½
per cent. because no dividend in any year to the ordinary share-
holders would ever exceed that paid to the preferred shareholders.

The question which I am called upon to answer has given
me much anxious thought. A great many cases were cited upon
the argument but I have not found any of them very helpful. So
far as they are applicable to this case they serve merely as examples
of the application of well-known general principles. It could
hardly be expected that a decision construing precisely similar
language in a company's charter would be available. And so I
find myself obliged to interpret the special provisions of this
charter as to the relative rights of the two classes of shareholders
almost wholly as a mere matter of construction.

Before proceeding to discuss these provisions, it may not be
amiss to state a few general principles governing the declaration
of dividends. Dividends can be declared out of profits only, and,
in companies incorporated as this is, only by the directors. If the
majority of shareholders are not satisfied with the distribution
of profits made or proposed by the directors then in office, their
only remedy is to replace the directors, when and as the company's
constitution permits, by others who will carry out their wishes.
Dividends are ordinarily a mere distribution of profits generally,
and, unless there is something in the company's constitution limiting
the powers of the directors, need not be referable to any
particular year or other period of time, nor need they be paid
out of the profits of any particular year or other period. Ordinarily
the shareholders through their directors may distribute among
themselves all the accumulated profits of their company whenever
and as often as they please, provided that in determining what
are profits they are careful to make no inroad upon the company's
capital.

When preference shares, duly created and issued, are declared
to be entitled to a fixed cumulative preferential dividend at a
certain rate per annum, any further participation in the profits
of the company is impliedly negatived, and if the right to any
further participation is to be granted it must be distinctly so
stated.

There is nothing in the company's charter here limiting the declaration of dividends to the profits made by the company in any particular year, so that, subject to the right of the preferred shareholders to be first paid out of profits their fixed cumulative preferential dividend at the rate of 7 per cent. per annum to the date of the distribution, and the retention in a reserve fund of "at least one year's dividend on the then issued preference shares," there is nothing in the charter to prevent the directors at any time distributing all the surplus accumulated profits among the shareholders in accordance with its special provisions in this regard. When I use the expression "at any time" I am not overlooking the fact that the state of the company's books or some other exigency of its business might make it necessary to have some regard to the close of the then current financial year.

Upon the opening of the case before me and throughout the trial, I was inclined to the view, to which I several times gave expression, that upon a fair reading of the special provisions of the charter in question here, the contentions of the plaintiffs were unsound and that the right of the ordinary shareholders to have their dividends brought up to an equality with those of the preferred shareholders before the latter could further participate in the profits must be confined to the particular sum which the directors then saw fit to distribute. In other words, that all that had gone before was a closed book. But, after much consideration, I have come to the conclusion that my earlier view was wrong and that the construction contended for by the plaintiffs is the correct one.

Whatever the intention of those who framed the charter may have been, the real meaning and effect must be gathered from the language of the special clause itself with due regard to the general principles already mentioned and not otherwise. The clause provides for the creation and issue, out of the authorised capital stock, of ten million dollars as preference stock, and then declares in paragraph (a) the nature and extent of its preference and priority.

Paragraph (a) is divided into three distinct parts. *First*, it declares that upon the liquidation, dissolution, or winding-up of the company the holders of the preference shares are to be entitled preferentially to the repayment of the amount of the par value of their shares and any arrears of dividends thereon. *Secondly*, it provides in effect that they are to be paid a fixed cumulative preferential dividend at the rate of 7 per cent. per annum out of any net profits which it may from time to time be determined to distribute in priority to any other shareholders.

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Orde, J.A. This provision, while confining the question whether or not profits shall be distributed at all to the judgment and discretion of the directors, establishes the right of the preferred shareholders to be first paid their dividends and all arrears thereof before any distribution can be made to the other shareholders. If the clause stopped there, it is settled law that the preferred shareholders could not participate further in the distribution of profits. They would be in truth, though, technically, not until legally distributable, the property of the ordinary shareholders to be enjoyed either when and as the directors might decide to distribute them or upon the ultimate liquidation, dissolution, or winding-up of the company. The clause proceeds to give to the preferred shareholders a right to participate in the further profits of the company, but only after certain conditions have been satisfied, and the main, if not the only, issue involved in this action is to determine what those conditions are. This *third* provision is as follows: "And the holders of such shares shall participate ratably with the holders of the issued ordinary shares in the distribution of net profits after the holders of the ordinary shares shall have received dividends equal to those paid on the preferred shares."

I was at first inclined to the view that that provision was linked up with the earlier one and was controlled by it. But I have reached the conclusion that it is really a broad, general declaration as to the respective rights of the preferred and ordinary shareholders in all the net profits after the cumulative preferred dividends have been provided for. There is nothing in the earlier portion of the clause which grammatically controls the direct and simple declaration contained in the third provision. If those who framed the clause had really intended to limit the rights of the ordinary shareholders in the surplus profits as contended by the defendants, it would have been such a simple thing to have said so. It is inconceivable that they would have chosen this language to express that intention.

There are in the provision two words which are utterly inconsistent with the views of the defendants, namely, the words "dividends" and "those" in the concluding portion of the clause "shall have received dividends equal to those paid on the preferred shares." If it was intended to confine the right of the ordinary shareholders to be placed upon an equality with the preferred class before the latter could further participate in the balance of net profits then immediately distributable, the words above quoted would have been in the singular, and the phrase would have read "shall have received a dividend equal to that paid on the preferred shares."

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The construction urged by the defendants really places the directors in a position to work the grossest injustice to the ordinary shareholders by the simple method of periodically declaring no dividend to them. Once that is done there is no future remedy, and that the consequent loss to the ordinary shareholders may be serious may be easily exemplified. Suppose that the directors decide that the accumulated profits are sufficient to justify dividends to all the shareholders of 10 per cent. per annum over a period of two years. If they see fit to distribute this at the rate of 10 per cent. in each of the two years, the preferred shareholders would, upon their present paid-up shares, receive in all \$1,299,260, and the ordinary shareholders \$2,300,000, a total distribution of \$3,599,260. But if in the first year a dividend of 7 per cent. only is declared upon the preferred shares and none on the ordinary, and the balance of the fund is then distributed the next year, the loss to the ordinary shareholders and the corresponding gain to the preferred is a fairly large sum, approximately \$290,000. Seven per cent. upon \$6,496,300 of preferred stock for the first year would be \$454,741 and for two years \$909,482. This sum deducted from the \$3,599,260 above mentioned would leave \$2,689,778 available for further distribution in the second year. Now, according to the contention of the defendants, the ordinary shareholders would be entitled to receive out of this a dividend of 7 per cent., amounting to \$805,000, and the balance, amounting to \$1,884,778, would be divided ratably among all the shareholders. This would mean a dividend of slightly more than 10.478 per cent., so that the preferred shareholders for the two years would receive 24.478 per cent. while the ordinary shareholders would receive 17.478 over the two-year period instead of 20 per cent. each, at the mere whim of the directors. The difference, namely, 2.522 per cent. upon \$11,500,000 of ordinary stock, would amount in effect to a loss to the holders thereof of more than \$290,000, which sum would go into the pockets of the preferred shareholders merely because the directors had seen fit to postpone the distribution of any profits to the ordinary shareholders for a year. If this is the meaning of the provision in question, then it clearly places it in the power of the directors to distribute the profits in a manner enormously to benefit the preferred shareholders.

Having regard to the general rule already mentioned which excludes preferred shareholders from any share of profits beyond their fixed cumulative preferential dividend, unless the right to further participation is expressly granted, I am of the opinion that the language of the charter falls far short of expressing any

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Orde, J.A. intention to cut down the rights of the ordinary shareholders in
1929. the surplus profits to the extent contended for by the defendants.
—
Ramsay If the provision fails to give that right explicitly or is ambiguous,
v. then it ought not to be so interpreted as to increase the preference
Steel Co. of already expressly given to the preferred stock and so make it
Canada possible to cut down the equitable right of the ordinary share-
Ltd. holders to all the surplus profits, beyond what is necessary in order
to give a just and reasonable meaning to its language.

The interpretation of the defendants, if applied strictly, really goes beyond what I think upon the argument they were willing to admit. The declarations of dividends may be made at any time, and there is no rule requiring them to be made annually or quarterly or at any other elapsed period of time. If the right of the ordinary shareholder to be placed upon an equality with the preferred shareholder before the latter is to share in the surplus is confined to the profits then declared by the directors to be released for distribution, and three quarterly dividends of, say, 1 $\frac{3}{4}$ per cent., having during a calendar year been paid to the preferred shareholders and none to the ordinary, and the directors desire to make a larger distribution for the fourth quarter, what happens, if, after paying the preferred shareholders 1 $\frac{3}{4}$ per cent. to make up their fixed cumulative dividend, the surplus exceeds 1 $\frac{3}{4}$ per cent. on the ordinary stock? If the defendants' view is correct, then, after paying the ordinary shareholders 1 $\frac{3}{4}$ per cent. in order to give them the same ratable share *out of that particular distribution*, the remainder must be ratably distributed to all the shareholders, preferred and ordinary. That is clearly the result if the defendants are right. And there is no justification for saying that the ordinary shareholders would be entitled upon that last quarter's distribution to have 7 per cent. before the preferred shareholders could participate. If the defendants' argument does not go that length, the basis for their contention disappears completely, for there is nothing in the language of the clause to support the view that the equality in the dividend rate to which the ordinary stock is to be brought before the preferred shareholders can further participate is referable to a year or any other particular period of time. As already stated, there is nothing in the charter requiring the preferential dividend to be declared yearly or at all. Seven per cent. per annum is merely a declaration of the rate, and it might just as well and as effectively have been declared to be 3 $\frac{1}{2}$ per cent. per six months, or 1 $\frac{3}{4}$ per cent. per quarter. The equality intended to be given to the ordinary shareholders before the preferred shareholders can participate is, in my judgment, a ratable equality in dividends to all "those" theretofore "paid on

the preferred shares" and not merely an equality to the particular preferred dividend then declared.

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The question was asked by the defendants' counsel: what would happen if there had been or were now a further issue of ordinary shares out of the unissued authorised capital? Would such new shares be entitled to share in the profits on the same footing as the old shares and so to share to the extent of 43½ per cent. before the preferred shareholders would further participate, notwithstanding that they were still in the treasury of the company unissued during part of the period covered by the so-called arrears of 43½ per cent. upon the ordinary stock? This seems a formidable argument, put in this way. Apart from some express power given by the Companies Act to issue such new shares with rights as to dividends inferior to those of the old shares, I know of no power in the company when declaring dividends to discriminate between old and new issues of stock. The difficulty, if it is a difficulty, might perhaps be overcome by the issue of the new shares as "deferred stock" under sec. 56 of the Companies Act (R.S.C. 1927, ch. 27). But, quite apart from that aspect of the question, this suggested difficulty is really none at all, for the situation does not differ materially from that in which any joint stock company (whether it has an outstanding issue of preferred stock or not) is placed which has built up a large accumulation of undivided profits and decides to add to its paid-up capital by the issue of new stock. Except in those cases where the stock is allotted and issued to the existing shareholders, common sense usually dictates the policy of the company, and the new shares are issued at a premium sufficient to offset the additional value given to the stock by the accumulated profits. The new shares would then of course receive dividends on the same footing as the old but without gaining any undue advantage thereby.

I do not overlook the fact that in the present case the issue of additional ordinary shares at par or at too low a premium might affect the excess dividends coming to the preferred shareholders, but I think the common interest of both preferred and ordinary shareholders would be sufficient to protect them against any such contingency. In any case, I do not consider the contention of sufficient weight to affect the meaning of the special clause in question, as I understand it. If the issue of further ordinary shares presents any real difficulty, that cannot be helped. The company might perhaps extricate itself by obtaining supplementary letters patent.

There remains to be considered the other ground of defence, namely, that the ordinary shareholders are estopped by the special

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declaration as to the respective rights of the two classes of shareholders appearing in the company's share certificates.

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The only authority cited on the argument which at all nearly approaches this case was *Ontario Jockey Club v. McBride*, [1927] A.C. 916. But there is no parallel between that case and this. There the question was substantially whether or not a shareholder, who had acquired and held his shares upon what was in effect a distinct agreement with the company that he could not transfer them except upon certain terms, could transfer them to another in breach of the agreement so as to entitle the transferee against the will of the company to be registered as a shareholder. The question, if treated as one of contract, arose out of a bargain between the then shareholder and the company, of which contract the transferee had notice. If treated as an estoppel, it arose by the action or conduct of the shareholder as between himself and the company, and, he being estopped from transferring except upon the terms to which he had agreed with the company, his transferee with notice acquired no right to be registered.

The rights of shareholders and the title to their shares do not ordinarily depend upon the issue of stock certificates at all but upon registration in the share-register and upon the terms of the charter. One may be the owner of stock in a company and never receive a certificate at all. Section 56(2) of the Companies Act requires that certificates for preference shares created by by-law shall set forth fully the terms and provisions of such by-law and that, if not so set out, the restrictions and limitations shall not be deemed to qualify the rights of the holders thereof. Whether or not that subsection is applicable where the preference shares are created by letters patent it is not necessary to determine. The issue here is one between two classes of shareholders, and I do not know upon what principle it can be said that the language of the stock certificates issued by the company can alter or affect rights conferred by the charter before the stock was issued. The rights of the two classes of shareholders do not depend upon the wording of the stock certificates at all. This is not to say that a particular holder of preferred shares who has acquired them from another holder upon the faith of that other's stock certificate and without notice may not have acquired some rights by way of estoppel against the company itself. I am not dealing with any such issue here. Here it is argued that the ordinary shareholders, by their acceptance of stock certificates which declared their rights to be less than those given by the charter, are thereby estopped as against the other shareholders. This is carrying the principle of estoppel beyond its limits, as I understand

them. There is no privity between the ordinary and the preferred shareholders. It must be difficult in any case to apply the doctrine of estoppel to a whole class and in favour of another class. So much depends upon the circumstances of each case as to the extent of the knowledge of the person setting up the estoppel, and how far he was affected by the act of the person alleged to be estopped, etc. And it is difficult to see how there could be established a common standing-by of the whole class of ordinary shareholders while the whole class of preferred shareholders acted in consequence thereof to their own prejudice. The fact that many of the members of the company hold both classes of stock presents an added difficulty.

Nor do I see how the principle of "contemporaneous exposition" can be invoked. The case might possibly be different if the ordinary shareholders had stood by and allowed the directors to pay increased dividends on the preferred stock; but, instead of acquiescing, the ordinary shareholders promptly took action the moment any such payment was suggested. There is no room whatever for the application here of any such principle as that raised by the second ground of defence.

The plaintiffs are therefore, in my opinion, entitled to judgment to the following effect:—

1. Declaring that by the terms of the letters patent and supplementary letters patent regulating the respective rights of the holders of preference and ordinary shares the holders of preference shares are not entitled to participate in any distribution of the net profits of the defendant company in excess of their fixed cumulative preferential dividend at the rate of 7 per cent. per annum until the total dividends declared upon the ordinary stock since the incorporation of the company shall be equal as to the rate thereof to that theretofore paid and declared upon the preference stock.

2. Declaring that the declaration of dividends upon the preferred stock by the resolution of the directors of the 19th December, 1928, was, to the extent of 25 cents per share of the par value of \$25 each, beyond the power of the defendant company and of its directors and is invalid.

3. Directing, if the plaintiffs deem it necessary, that in so far as any such excess in the dividends so declared upon the preferred shares, either by that resolution or any subsequent resolution, has been paid, the payments so made in excess shall be duly taken into account by a corresponding reduction in the next dividend declared.

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4. An injunction restraining the defendant company and its directors from paying any dividends to the preferred shareholders except in accordance with the declaration hereinbefore set forth, and also from issuing stock certificates containing any statement of the respective rights of the preferred and ordinary shareholders not in accordance with such declaration.

5. The costs of the plaintiffs and of the defendants Rogers and Coppley are to be paid by the defendant company.

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GILMORE v. TOWNSHIP OF WESTMINSTER.

Municipal Corporations—By-law of Township Council Closing Portion of Original Allowance for Road—Depriving Plaintiff of Access to her Land—Municipal Act, R.S.O. 1927, ch. 233, secs. 483, 484, 503, 504—Absence of Provision for another Convenient Way—Condition Prescribed by sec. 484—Bona Fides of Council—Evidence.

A by-law passed by a township council in July, 1928, reciting that it was deemed expedient to close a certain portion of an original road-allowance, owing to the fact that that portion had fallen into disuse, and that a road around a pond, as shewn in a registered plan, had for many years been established and laid out in place of the original allowance, enacted that the portion described should be stopped up and forever closed and cease to be and form part of the highway, and should be disposed of and conveyed to the adjoining owners on payment by each such owner of \$1, and that on default of payment by any owner the part directed to be conveyed to him should be sold and disposed of in such other way as the council might direct. The plaintiff, who owned the land lying to the north of the original allowance and between the land formerly owned by one B. and the pond, complained that the effect of the by-law would be to deprive her of the means of ingress and egress to and from her land over the part of the highway purported to be stopped up:—

Held, that the by-law was passed in exercise of the powers supposed to have been conferred by sec. 483 (1) (c) of the Municipal Act, R.S.O. 1927, ch. 233, and was invalid under sec. 484 because it did not provide another convenient road or way of access to her land; and, the by-law being invalid as a whole, it was impossible, in proceedings taken for the purpose of having it quashed, to pass upon the question whether any by-law providing merely for a sale and conveyance under sec. 503, or for a conveyance under sec. 504, or for conveyances to persons alleged to have become entitled to them under earlier legislation, could be supported.

History of the legislation and reference to *In re Choate and Township of Hope* (1858), 16 U.C.R. 424, and *Pirie & Stone v. Parry Sound Lumber Co.* (1907-9), 11 O.W.R. 11, 13 O.W.R. 319.

The attack upon the by-law upon the ground that it was not passed in good faith and in the interest of the township failed upon the evidence.

ISSUE as to the validity of a municipal by-law; directed to be tried upon oral evidence and documents.

The issue was tried before Rose, J., without a jury, at London.
H. R. Cluff and *D. S. Menzies*, for the plaintiff.
T. G. Meredith, K.C., and *W. B. Henderson*, for the defendants.

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August 26. ROSE, J.:—This is an issue tried pursuant to a direction given by Mr. Justice Raney upon the hearing of a motion made before him for an order to quash a by-law (No. 918) passed by the Council of the Township of Westminster on the 3rd July, 1928, which by-law purports to close part of the original allowance for road between the first and second concessions of the township and to authorise the sale and conveyance of the part closed. The direction given was that the applicant and the corporation should proceed to the trial of an issue wherein the applicant should be plaintiff and the corporation should be defendant and that the question to be tried should be set out in pleadings to be delivered. The motion was not in terms referred to the Judge trying the issue.

The concession-road of which a part has by the by-law been declared to be closed is shewn on the plans as running in an easterly and westerly direction between concession one on the north and concession two on the south. It crosses a pond which is said to be very deep and which has an area of some 13 acres. The north end of the pond seems to be some 900 feet north of the north side of the road. The road has never been opened across the pond, nor westerly from the pond to the first of the side-roads laid out west of the pond; but east of the pond, where the plaintiff's land is situate, the road was at some time opened to the shore of the pond, or at least to the top of a bank surrounding the pond, the crest of which bank is some 12 feet or more in height at a distance of some 200 feet from the shore. As early as the year 1855 a road which is spoken of by the witnesses as "the road around the pond" was laid out, running around the northern end of the pond from a point in the concession-road distant some 600 feet east of the shore of the pond to a point in the same concession-road a considerable distance west of the western shore of the pond. And in the year 1876 the corporation of the township by deed conveyed a portion of the northern half of the original road-allowance to Martha Barclay, the widow of James Barclay, who in his lifetime had been the owner of land adjacent to the northern side of the eastern part of so much of the original allowance as lay between the road around the pond and the shore of the pond. In the deed of conveyance, which was registered in December, 1880 (and affords *prima facie* evidence of the facts recited in it), is a recital that "a road has been opened leading round the mill-pond in lieu of that part of the allowance for road in front of the

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second concession of the said township of Westminster;" and also that "the said Municipal Council of the Township of Westminster, after having published the necessary notices and having received a report from William McMillan, a provincial land surveyor, that the road established round the mill-pond, in lieu of the allowance for road on the second concession aforesaid, is sufficient for the purposes of a public highway, did by by-law No. 104, duly passed on the 17th day of October, A.D. 1859, enact that" a certain portion of the original allowance should be sold to Barclay "at the rate of \$40 per acre."

No question is raised now as to the validity of the conveyance to Mrs. Barclay: all that the by-law that is attacked professes to do is to close and authorise the sale and conveyance of the remaining part of the site of the original road-allowance lying between the road around the pond and the eastern edge of the pond. The plaintiff owns the land lying to the north of the original allowance and between the land formerly owned by Barclay and the pond. Her case is that the township council has no power to stop up what remains of the original highway and sell the soil of the part stopped up without certain consents required by sec. 483 of the Municipal Act (R.S.O. 1927, ch. 233) which will be referred to later; and that the effect of the by-law will be to deprive her of the means of ingress and egress to and from her land or place of residence over the part of the highway purported to be stopped up, and therefore that, by reason of sec. 484, the council had no power to pass the by-law without providing another convenient road or way of access to her land or place of residence; and also that the by-law was passed, not in good faith and in the interest of the municipality, but at the instigation and solely in the interest of Dr. H. A. Stevenson, the present owner of the land formerly held by Barclay, and upon the promise of Dr. Stevenson to pay any costs to which the council might be put in connection with the passing of the by-law.

The first condition of sec. 483 invoked is contained in subsec. 3. By that subsection it is enacted that a by-law passed under the authority of clause (c) of subsec. 1 (as this by-law seems to be) in respect of an allowance for road reserved in the original survey along or leading to the bank of any river or stream or on the shore of any lake or other water shall not take effect until it has been approved by the Lieutenant-Governor in Council. This subsection does not seem to have any application. The road in question does not lead to the bank of any river or stream; and, while the pond may answer the description of "other water" in the ex-

pression "lake or other water," still the road, while it leads to the shore of the pond, is not a road *on* the shore of the pond within the meaning of the subsection.

The second condition invoked is that of subsec. 6, which requires, for the validity of a by-law passed by the council of a township under clause (c) of subsec. 1, confirmation by a by-law of the council of the county in which the township is situate, passed not sooner than three months or later than one year after the passing of the by-law by the council of the township. No evidence of the passing of a confirmatory by-law was adduced, but the time within which such a by-law may be passed has not expired, and the lack of confirmation is no reason for declaring the invalidity of the by-law that is attacked.

The plaintiff fails, in my opinion, to establish the allegation that the by-law was not passed in good faith and in the interest of the township. It is true that Dr. Stevenson seems to have been active in promoting the passing of the by-law and to have promised to save the township harmless. It is true also that some of the arguments in favour of the closing of the road put forward by members of the council do not appear to be very substantial and that there is ground for the suggestion that some of the members seem to have acted without giving much consideration to the arguments put forward by persons who petitioned against the closing of the road. But all this falls far short of that clear proof of bad faith on the part of the council which is required to sustain an attack upon the by-law.

The substantial objection to the by-law is that the condition prescribed by sec. 484 has not been complied with. As has been stated, the land owned by the plaintiff is bounded on the south by the original allowance for the concession-road, on the east by the land of Dr. Stevenson (Barclay's successor in title), and on the west by the pond. On the north it is bounded by lot 17. So much of lot 17 as lies between the road around the pond and the pond is a small triangular parcel. The base of the triangle (the frontage on the road) is about 90 feet in length. The apex is at the shore of the pond. North of lot 17 is lot 16. So much of it as lies to the west of the road around the pond is wider where it adjoins the road than it is at the west where it touches the pond. The high bank that has been spoken of follows roughly the contour of the pond itself and, as has been stated, has its crest (generally speaking) some 200 feet away from the shore. Between this crest of the bank and the easterly limit of the plaintiff's property at the north side of the road-allowance there is room for a driveway

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for motor-vehicles. A little farther north, where the plaintiff's house is situate, the crest of the bank is nearer to the pond, and the plaintiff has a fairly wide piece of level ground. The plaintiff was the owner of the parts of lots 17 and 16 that have been described, and so long as she possessed these lands it was possible for her to pass with vehicles across lot 17 from the land that she owns at present to the level part of lot 16 adjoining the road around the pond. In the eastern fence of lot 17 there is a gate opening on the road around the pond, with a roadway to the barn situate on that lot or on lot 16; and there is a foot-path from this gate leading by way of lot 17 to the northern side of the plaintiff's land close to the high bank. But there is a gully in lot 17, and this foot-path, running as it does through the gully, is not suitable for vehicular traffic. Therefore the only convenient means of access that the plaintiff has at present to her house with vehicles is by way of the original concession-road.

The parts of lots 17 and 16 formerly owned by the plaintiff were by her conveyed to her daughter Mrs. Watts by a deed dated the 25th July, 1925. The closing of the road had been mooted before the date of that conveyance, and on the 21st July, 1925, the corporation had in a newspaper published in London given notice of the proposed passing of the by-law. It is alleged that the conveyance to Mrs. Watts was not a genuine conveyance but was intended merely as a means of hampering the municipality in the exercise of its powers, and that Mrs. Watts really holds in trust for the plaintiff. My opinion upon the evidence is that the conveyance was genuine. The plaintiff says, and I think she is to be believed, that the bargain between herself and her daughter had been made long before July, 1925, but that because of Mrs. Watts's absence the conveyance had not been completed. She says that she had not seen the advertisement at the time of the execution of the conveyance and that her action was not in furtherance of the design alleged by the defendants. But, even if the plaintiff were still the owner of the parts of lots 17 and 16 that have been conveyed to Mrs. Watts, I do not think that, without the entrance from the concession-road, she could be said to have anything like a convenient means of ingress and egress to and from the part of the land upon which her house is situate. It is true, as has been stated, that from the north, over lots 17 and 16, she would have access, but she would not have any convenient access with vehicles —especially motor-vehicles.

For these reasons I think that the by-law, if it is to be treated as a by-law passed pursuant to the powers conferred by sec. 483

(1) (c) of the Municipal Act, is invalid. Notwithstanding the sale to Mrs. Barclay of the part of the northern half of so much of the road-allowance as abuts the southern side of the Barclay (Stevenson) land, there is at present a way, as wide as is needed by the plaintiff, along the allowance for road to her land, and no other convenient road or way of access to her land or place of residence has been provided.

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The defendants assert a present right, independently of sec. 483 (1) (c), to sell so much of the original road-allowance as was not in 1876 conveyed to Mrs. Barclay. In the statement of defence this right is based upon secs. 503 and 504 of the Municipal Act. There may however be a question as to whether such a right, if it exists at all, is derived from sec. 503 or sec. 504, or from one of the relevant sections of an earlier Act. By some of the earlier statutes it was enacted that when a new road had been opened in lieu of an original allowance, the owner of lands adjoining the original allowance should in certain circumstances be entitled to the original allowance; and it may be that the predecessors in title of the present owners of the lands lying immediately to the south of the original allowance acquired, under one or another of those statutes, a title to the southern half of the original allowance, and a right to a conveyance by the municipality of the land to which they had thus become entitled. Hence it may be that the present owners of the lands to the south are in a position to demand a conveyance, or, without a conveyance, to stop up the southern half of the original allowance, and in that way effectually to bar the plaintiff from access over the original allowance to her land. But, as will appear when the statutes are looked at, the evidence adduced in this case is insufficient to establish either the title (if any) of the owners of the lands lying to the south of the original allowance or the right of the municipality to convey to such owners. My opinion (as will appear later on) is that this question is not open for discussion in the present case. Nevertheless I think it well to refer shortly to some of the legislation and to indicate the difficulty that there would be in applying it upon the evidence that has been adduced.

To begin with secs. 503 and 504 of the present Act. Section 503 applies where a highway for the site of which compensation was paid is established and laid out in place of the whole or any part of an original allowance for road. In such case, if the council determines to sell the original allowance, the price is to be fixed by the council, and the owner of the abutting land is to have the right to purchase at that price; or if there are more owners than

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one each has the right to purchase, to the middle line of the allowance, the part of the allowance upon which his land abuts. Section 504 applies when a highway for the site of which compensation was not paid has been laid out and opened in the place of part of an original allowance for road. In such case the owner of the land appropriated for the highway (or his successor in title), if he owns the land which abuts on such allowance, shall be entitled to the soil and freehold of the allowance and to a conveyance (if there has been no conveyance to himself or his predecessor); and, if the land which so abuts is owned by more persons than one, each is entitled to a conveyance of the soil and freehold of that part of the allowance upon which his land abuts, to the middle line of the allowance.

The difficulty in applying either of these sections lies in the fact that, while, as has been stated, there is evidence that a highway was established and laid out in place of the original road-allowance, there is no evidence upon which it can be found with any certainty either that compensation was paid or was not paid; so that it cannot be said either that the case falls within sec. 503 and that the council, if it determines to sell the original allowance, may fix the price, or that it falls within sec. 504 and that the present owners of the lands abutting upon the original allowance (assuming them to be, although it is not proved that they are, the successors in title of the owner of the land that was taken for the site of the road around the pond) are the owners of the soil and freehold of the original allowance and are entitled to have their respective portions of the original allowance conveyed to them by the municipality.

Similar difficulty arises if the case is treated as depending not upon the present Act but upon one of the earlier statutes. Assuming the road around the pond to have been laid out in the year 1855 (which is the year of the earliest plan produced at the trial), it seems that at the time of the laying out of the new road there was no power to convey the soil and freehold of the original allowance. The Municipal Amendment Act of 1853 (16 Vict. ch. 181) enacted (sec. 32) that on the alteration of a road which was not an original allowance for road, or which lay within an incorporated village, town, or city, the site might be sold; but at that time it was not competent to the municipality of any township to pass a by-law for stopping up an original allowance for a road in the township: (1849) 12 Vict. ch. 81, sec. 187. The right, therefore, of the adjoining owners to have conveyances of the soil of the orginal allowance that is in question in this case, if such right arose, must have been created by some of the later legislation.

In 1857 an Act was passed (20 Vict. ch. 69) "to provide more fully for the stopping up and sale of original road-allowances in Upper Canada." It repealed so much of sec. 187 of the Act of 1849 as prohibited the passing of by-laws for stopping up or selling original road-allowances (sec. 2) and authorised the townships to pass such by-laws subject to confirmation by by-law of the county council. And it enacted (sec. 4) that when a new road for which compensation had been or should be paid had been or should be opened up in lieu of an original allowance, the township council might sell the original allowance to the owners of the adjoining lands, or in case of their refusal to purchase then to other persons; and (sec. 5) that when a public road for which no compensation had been or should be paid had been or should be opened in lieu of an original road-allowance, the council should have power, and they were authorised and required upon a certain report of a land surveyor, to convey the original allowance to the persons through whose lands the same had run, in lieu of the new road; but by sec. 7 it was declared that it should not be lawful for any municipality to close any public road or highway, whether an original allowance or a road opened by a council, so as to exclude any person from ingress or egress to or from his farm or place of residence over such road.

Section 5 of the Act of 1857 was under consideration in *In re Choate and Township of Hope* (1858), 16 U.C.R. 424, as was also sec. 2. The Court thought that until a by-law had been passed stopping up the original allowance there could be no sale or conveyance. But this was a decision expressly upon sec. 2; and in *Pirie and Stone v. Parry Sound Lumber Co.* (1907), 11 O.W.R. 11, Mr. Justice Riddell (whose judgment was affirmed on appeal without any special discussion of this particular point: (1909) 13 O.W.R. 319) came to the conclusion that sec. 5 was operative without any by-law for the stopping up of the original allowance. His opinion was that, as the section declared the owners of the adjoining lands to be entitled to a conveyance, they were so entitled even when the original allowance had not been declared to be closed.

The Act of 1857 had been repealed before the by-law authorising the conveyance to Mrs. Barclay was passed. The Act that was in force at the time of the passing of that by-law was the Municipal Institutions Act of 1858 (22 Vict. ch. 99). By sec. 305 of that Act the prohibition against closing any public road or highway, whether an original allowance or otherwise legally established, so as to exclude any person from ingress and egress

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to and from his lands or place of residence over such road was continued: all such roads were to remain open for the use of the persons who required the same. (It was in 1872, by 36 Vict. ch. 48, sec. 422, that the modern prohibition against closing a road without paying compensation and providing another means of access was substituted for the absolute prohibition contained in the earlier statutes.) However, sec. 317 (11) of the Act of 1858 provided that when a public road for the site of which compensation had been paid had been opened in lieu of the original road-allowance, the township council might pass a by-law for the sale of the original allowance to the persons adjoining whose lands the same was situate, and in case of refusal of those persons to become purchasers then for the sale to other persons. And by sec. 318 it was enacted that in case a new road for the site of which no compensation had been paid had been laid out and opened in lieu of an original road-allowance, the owner of the land taken for the new road, if his lands adjoined the original allowance, should be entitled thereto in lieu of the land taken from him, and the council was authorised upon a certain report of a surveyor to convey the original allowance. And it was further enacted that in case compensation was not paid for the new road, and the person through whose land the same passed did not own the land adjoining the original allowance, the amount received from a purchaser of the corresponding part of the original allowance should be paid to the person who at the time of the sale owned the land through which the new road passed. It will be observed that sec. 318 takes the place of sec. 5 of the Act of 1857, in that it provides for the case in which no compensation has been paid to the owner of the land taken for the new road, such owner if his land adjoins the original allowance being declared to be entitled thereto in lieu of the land taken from him. And I take it that the result of the decision in *Pirie and Stone v. Parry Sound Lumber Co.* is that, if the facts were such as to bring sec. 318 into operation, the owner of the land taken for the new highway became the owner of the soil of the original allowance and was entitled as of right to a conveyance from the municipality. But, just as in dealing with secs. 503 and 504 of the present Act, it is seen that the question as to the present ownership of the soil of the original road-allowance depends (if the Act of 1857 or the Act of 1858 is applicable) upon facts which are not established by the evidence adduced. There was a suggestion that from the form of the by-law passed in 1859 an inference could be drawn as to the council's belief as to whether compensation had or had not been paid. The inference, however, is rather weak; and the ques-

tion, if it has to be discussed, is not what the council believed but what the fact was.

The by-law that is attacked recites that it is deemed expedient to stop up and close a certain portion of the original road-allowance "owing to the fact that the said portion of the said original allowance has fallen into disuse, and that such road round the pond, as shewn in registered plan 80, has for many years been established and laid out in place of the said original allowance;" and it proceeds to enact that from and after the passing of the by-law all that portion of the original allowance particularly described shall be stopped up and forever closed and cease to be and form a part of the highway, and shall be disposed of and conveyed to the adjoining owners on payment by each such owner of the sum of one dollar, and that on default of payment by any owner the part directed to be conveyed to him shall be sold and disposed of in such other way as the council may approve or direct. It is obviously a by-law passed in exercise of the powers supposed to have been conferred by sec. 483 (1) (c); and, while the direction to sell and convey is the direction that would be given in case the council, acting under sec. 503, had determined to sell an original allowance in place of which a highway for the site of which compensation had been paid had been established, still I do not think it was open upon the motion, and I do not think it is open upon the trial of the issue, to go into the question as to whether the persons to whom the municipality is offering to make conveyances are persons who, in virtue of sec. 503, or of any earlier legislation, are entitled to have the land conveyed to them. I think that the by-law, being a by-law for stopping up and selling, is invalid under sec. 484, and that, being invalid as a whole, it is impossible in the present proceedings to pass upon the question as to whether any by-law providing merely for a sale and conveyance under sec. 503, or for a conveyance under sec. 504, or for conveyances to persons alleged to have become entitled to them under the earlier legislation, could be supported.

It must be declared that by-law No. 918 was not duly passed by the council of the township and ought to be quashed, and the defendants in the issue must be ordered to pay the costs of the issue. The original motion, I take it, is still standing to be disposed of and can be brought on to be heard and disposed of in the Weekly Court, or, if the parties prefer to have the motion treated as having been referred to the Judge trying the issue, the order may include a term disposing of it conformably to the finding made upon the issue.

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At the trial it was stated that negotiations for a settlement were proceeding, and it was intimated that judgment upon the issue might well be deferred. Later, however, the registrar informed me that the negotiations had been without result. Therefore I proceed to pronounce judgment. But I venture to express the hope that even now, without further litigation, it may be found practicable to arrange for the closing of the road to the public (which is what the members of the council profess to desire) and for securing for the plaintiff a narrow, private right of way from the road around the pond to her land over a part of the original allowance (which is all that she really needs).

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Sept. 14. *Vendor and Purchaser—Agreement for Sale of Land—Substantial Deficiency in Quantity—"More or less"—Specific Performance with Abatement in Price.*

Where a contract for the sale and purchase of land rests *in fieri*, the purchaser, if the quantity be considerably less than it was stated, will be entitled to an abatement, although the agreement contains the words "more or less" or "by estimation."

This rule, stated in Sugden on Vendors and Purchasers, 14th ed., p. 324, adopted and applied in an action by the purchaser for specific performance with compensation for an admitted and substantial deficiency of acreage, where the agreement was for the sale of "ten acres more or less, being that part" of a certain lot described merely by reference to its situation.

Wilson Lumber Co. v. Simpson (1910-11), 22 O.L.R. 452, 23 O.L.R. 253, distinguished.

In the absence of any description by metes and bounds from which the purchaser could have estimated the quantity of land for himself, the words "more or less" should not be construed as the equivalent of "as estimated" or of "as supposed," but as meaning "about the specified number of acres," and as designed to cover such small errors as sometimes occur in surveys.

ACTION by a purchaser of land for specific performance of the agreement of purchase and sale, with compensation for an admitted deficiency of acreage.

The action was tried before RANEY, J., without a jury, at Sandwich.

J. W. Murphy, for the plaintiff.

G. S. Fraser, for the defendant.

September 14. RANEY, J.:—The plaintiff sues, as purchaser, for specific performance of an agreement for the sale of land in the township of Sandwich West, with compensation for an admitted deficiency of acreage. The defendant, the vendor, is ready and willing to convey the property, but is not willing to allow any

abatement of price. The neat question for the Court, therefore, is whether the plaintiff is entitled to compensation for the deficiency.

The defendant acquired the property in March, 1928, under a deed which described it by metes and bounds in arpents (an arpent being in linear measure one side of a square arpent) with the added words "containing ten arpents more or less." In June, 1928, the defendant offered to sell the parcel to the plaintiff for \$16,000 under the following description: "the ten acres more or less, being that part of farm 71 in the township of Sandwich West, Essex county, Ontario, fronting on the fourth concession-road between Dougal and Huron Mine Roads."

This offer the plaintiff accepted.

An arpent is approximately five-sixths of an acre.

At the time the defendant made the agreement with the plaintiff, the defendant knew: (1) that an arpent was not an acre; (2) that the parcel of land in question contained ten arpents, not ten acres; (3) that the plaintiff understood he was acquiring "ten acres more or less;" (4) that the property was being acquired by the plaintiff for subdivision purposes; and (5) that for subdivision purposes its value depended largely upon the acreage.

Knowing these facts, the defendant was content to leave the matter there and to take his chances of collecting the \$16,000 from the plaintiff.

The defendant himself prepared the new description, "ten acres more or less," and handed it to his agent, who inserted it in the offer to the plaintiff, and I have no doubt that the exaggerated statement of area was intended to commend the property to the plaintiff.

The land was enclosed by a fence, but there is no evidence that the purchaser knew anything about it except what he learned from the description in the agreement.

The foregoing findings of fact are, I think, sufficient to dispose of the case. But, if I had been able to find good faith on the part of the defendant, the plaintiff would still, in my opinion, be entitled to specific performance of the agreement, with compensation.

The general principle is well established that where a misrepresentation is made by the vendor as to a matter within his knowledge, and even though it may be founded on honest belief in the truth of the representation, and the purchaser has been misled by such misrepresentation, the purchaser is entitled to have the contract specifically performed, so far as the vendor is able to do so, and to have compensation for the deficiency: *Connor v. Potts*, [1897] 1 I.R. 534, 538, and *MacKenzie v. Hasketh* (1877), 7 Ch.D. 675.

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But in neither of these cases were there words raising an uncertainty as to the exact area of the lands covered by the agreement, such as the words "more or less."

The leading case in the Ontario Courts on the effect of the words "more or less" is *Wilson Lumber Co. v. Simpson* (1910), 22 O.L.R. 452, and in appeal (1911) 23 O.L.R. 253. In that case the contract was for the sale of a city lot described as having a depth of 110 feet more or less. The lot ran to a lane and was bounded by streets on two sides so that the depth could be easily seen. The depth was in fact only 98 feet 6 inches. The purchaser sued for specific performance, with compensation for the deficiency. In his judgment after the trial, the Chief Justice of the Common Pleas reviewed the English and American authorities—no Canadian cases bearing on the point having been cited to him—and expressed his approval of the judgment of the Supreme Court of Massachusetts in *Noble v. Googins* (1868), 99 Mass. 231, as written by Mr. Justice Gray of that Court. The description in the agreement in question in the Massachusetts case called for a frontage of 220 feet "more or less," being the property "bounded on one side by the shipyard of Paul Curtis and on the other by that of Donald McKay." Thus the facts in the Massachusetts case were similar to those in the *Wilson Lumber Company* case.

In the Massachusetts case, after reviewing the English authorities, Mr. Justice Gray proceeds:—

"The American courts have shewn more unwillingness than the English to encourage litigation about the amount of the price by reason of a variation in the quantity of land agreed to be conveyed, without clear evidence that the quantity was made an essential element of the bargain;" and then concludes his judgment in these words: "It has since been declared" (by courts in the United States) "by a great weight of authority, in accordance, as we think, with the soundest reason, that in an agreement for the sale and purchase of land for an entire sum either a description of the land by its boundaries, or the insertion of the words 'more or less' or equivalent words, will control a statement of the quantity of land or of the length of one of the boundary lines, so that neither party will be entitled to relief on account of a deficiency or surplus, unless in case of so great a difference as will naturally raise the presumption of fraud or gross mistake in the very essence of the contract."

In the course of his reasons, Mr. Justice Gray had previously remarked:—

"There could be no better evidence of the unsatisfactory state of the English law upon this point than the caution with which

it is expressed by so acute, discriminating and profound a commentator and so eminent a judge as Lord St. Leonards:— ‘Where the contract rests *in fieri*, the general opinion has been, that the purchaser, if the quantity be considerably less than it was stated, will be entitled to an abatement, although the agreement contain the words “more or less,” or “by estimation,” or even stronger words.’ Sugden on Vendors (14th ed.) 324.”

Mr. Edward Burtenshaw Sugden, the author of “Vendors and Purchasers,” became Lord Chancellor in 1852 and was then raised to the peerage as Baron St. Leonards. The 14th edition of his book from which the above extract is taken was issued in 1862. The Dictionary of National Biography remarks that his judgments “were very rarely reversed, and the opinions expressed in his textbooks were hardly less authoritative.”

Where in a sale of land the quantity is stated (for instance, as ten acres), and the price is stated in a lump sum (as, for instance, \$16,000), the presumption is that the price was fixed with reference to the quantity: Dart on Vendors and Purchasers, 6th ed. (1888), vol. 2, p. 736; *Hill v. Buckley* (1811), 17 Ves. 394. I apprehend that this will still be the presumption though the words “more or less” be added to the stated acreage (for instance, as in the present case, “ten acres, more or less”). If that be true, then the effect of the agreement in question in this action is not different from what it would have been had the agreement been for the sale of ten acres, more or less, at \$1,600 per acre.

In his reasons in *Wilson Lumber Co. v. Simpson* the Chief Justice of the Common Pleas, after himself reviewing the English authorities, remarks that they fully justify the statement of Mr. Justice Gray that it is difficult to extract from them any consistent principle, and his judgment accordingly was that the plaintiff was not entitled to compensation for the deficiency in the depth of the lot.

I venture to suggest that the difficulty, whatever it may be, of extracting a consistent principle from the English cases, is largely due to the fact that each case turned on its own circumstances, as, indeed, also did the judgment of the Chief Justice of the Common Pleas, and that of the Massachusetts court.

At all events I do not think that the rule as stated in Sugden has been abrogated, so far as this Province is concerned, by the judgment in *Wilson Lumber Co. v. Simpson*, and I can think of no reason that would justify me in failing to apply that rule to a case that is squarely within its language, and without any modifying circumstances.

In *Wilson Lumber Co. v. Simpson* the description was by metes and bounds in linear feet, with the added words “more or less.”

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Under such a description it could not be argued that the lump sum price was arrived at by a price per square foot. This appears to have been the view of the case taken by a Divisional Court composed of Sir John Boyd and Justices Riddell and Middleton. In delivering the judgment of the Court at the close of the argument, the Chancellor said:—

“This . . . is not a sale of so many feet at so much per foot, but of a block of land having certain specified and visible boundaries, at a lump sum.”

In the absence in the case now before the Court of any description by metes and bounds from which the purchaser could have checked up the quantity for himself, I think the words “more or less” are not to be construed as the equivalent of “as estimated,” or “as supposed,” but are to be construed to mean, “about the specified number of acres,” and as designed to cover such small errors as sometimes occur in surveys: *Winton v. McGraw* (1906), 60 W. Va. 98.

The deficiency in the present case amounts to substantially the difference between acres and arpents, or 16.5 per cent. of the quantity of land which the plaintiff thought he was purchasing.

The plaintiff was to pay at the rate of \$1,600 an acre for the property, and I think he is entitled to an abatement of the purchase-price on that basis, that is to say 16.5 per cent. of \$16,000.

There will be judgment for the plaintiff accordingly, and for the costs of the action, and the plaintiff may, at his own risk, have a reference as to damages, and the costs of the reference if taken will be reserved.

[APPELLATE DIVISION.]

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Contract—Lease of Dock and Warehouse—Special Clause—Termination of Lease—Action for Rent and Specific Performance—Defence—Furtherance of Conspiracy to Violate Laws of Foreign Country—Failure to Prove Conspiracy—Importation of Intoxicating Liquors into United States — Knowledge of Illegal Purpose — Proof of Foreign Law—Expert Evidence—Form of Judgment as to Assessment of Damages.

The plaintiff leased to the defendants a dock and warehouse situate on the Detroit river, “with privilege to lessees to terminate this lease on three months’ notice in event of liquor export business from docks and wharves being stopped by the Government.” The defendants took possession and paid rent for more than a year, and then vacated the property and refused to pay further rent, notifying the plaintiff that, the Government having stopped the supply of liquor from docks and wharves, they desired to terminate the lease and surrender possession. In an action to recover rent and for specific performance, the defence based on the provision of the lease quoted failed for want of evidence that the Government had

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changed the regulations so as to deprive the defendants of the right to store in the warehouse and export from the dock intoxicating liquors. But the defendants also set up that the creation of the lease was in furtherance of a conspiracy between the plaintiff and defendants to violate the laws of the United States of America:—
Held, that it is importation of intoxicating liquors into the United States that is contrary to the laws of that country, and there was no evidence of any purpose or intention that the defendants should import and no evidence of any actual or attempted importation; and therefore the plaintiff established his case by production of the lease without disclosing any illegality.

Mere knowledge, if knowledge were proven, is not equivalent to participation.

Hager v. O'Neil (1891-3), 21 O.R. 27, 20 A.R. 198, and *Clark v. Hagar* (1894), 22 Can. S.C.R. 510, followed.

Whether or not the doing of acts which merely facilitate the acquisition by United States citizens or others of liquor which they may or may not import into the United States may be urged as evidence of conspiracy—still conspiracy must be proved as a fact; and it was not established in this case.

The evidence given by a Michigan lawyer, called as a witness for the defendants, was ineffective. The “opinion” of a lawyer alone does not prove the law—he must be in a position to testify that such is in fact the law.

The form of a clause in the judgment of the Court below directing an assessment of damages corrected.

AN action by William T. Westgate against Samuel Harris and two others to recover rent reserved by a lease of a wharf and warehouse upon the Detroit river and for specific performance of the lease.

The main defence was that the plaintiff leased the wharf and warehouse to the defendants to be used for the storing for export of intoxicating liquors and the exporting thereof to the United States of America; that the importation, purchase, sale, use, or other traffic in intoxicating liquors was at the time of the demise and is now a penal offence in the United States and is prohibited by an Act of Congress, and the creation of the demise was in furtherance of a conspiracy between the plaintiff and the defendants to violate the laws of a friendly foreign nation and to induce the violation thereof by citizens of the United States; that the demise is illegal and against public policy, and the plaintiff is not entitled to the assistance of the Court in the enforcement of the performance by the defendants of the provisions of the lease.

December 17, 1928. The action was tried before LOGIE, J., without a jury, at Sandwich.

E. C. Kenning, for the plaintiff.

I. B. Levin, for the defendants.

LOGIE, J. (at the conclusion of the examination of witnesses and hearing):—There will be judgment for the plaintiff for \$1,800 and for damages.

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If a lease of this kind is against public policy in Canada, although the export of liquor is still permitted by the legislation and regulations of the Parliament of Canada, there is no evidence of export in fact to the United States contrary to the laws of that country, or of an intention between the parties to the lease to commit a breach of those laws. Surmise is not enough, nor can I take judicial notice of alleged rum-running conditions at Windsor. There must be proof. That proof might have been supplied by the defendants, but it was not.

The lease being repudiated, the defendants will pay damages to be assessed by the Local Master at Sandwich.

The defendants appealed from the judgment of LOGIE, J.

May 7. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A.

Shirley Denison, K.C., and *Levin*, for the appellants. The law of Canada renders the lease void because it contemplates the breaking of the law of a friendly country, i.e., the United States, according to the undisputed evidence: *Ralli Brothers v. Compañía Naviera Sota y Aznar*, [1920] 2 K.B. 287, at pp. 303-4; *Windsor Truck and Storage Co. v. Carling Export Brewing and Malting Co.* (1925), 28 O.W.N. 302. Knowledge plus assistance is the test. The plaintiff, under a contract which describes the lessees as "exporters," furnishes a building and equipment, i.e., docks, etc., designed for one purpose only—exporting intoxicating liquor to the United States. Therefore it cannot be enforced: *Clugas v. Penaluna* (1791), 4 T.R. 466; *Pearce v. Brooks* (1866), L.R. 1 Ex. 213. The Court should draw from the evidence natural inferences which ordinarily intelligent people would draw: *Smith v. Benton* (1890), 20 O.R. 344.

J. W. Pickup, for the plaintiff, respondent. The violation of the laws of the United States takes place only at the point of importation. There is no such violation at the dock of the respondent. There is nothing in the evidence to shew that what was done on that dock was in any sense exportation to the United States. No unlawful user of the dock was in contemplation and there was in fact never such. If anything unlawful is done, it is done in the waters outside or at the point of entry into the United States. There is no evidence to shew that vessels leaving the dock had not the proper clearance papers under the Customs Act, R.S.C. 1927, ch. 42, secs. 91-93. It must be assumed that all legal requirements were complied with. Therefore what was done at the dock of the respondent was legal and in accordance with the law of Canada; it was done with the approval of the Government

and under its supervision. There is no evidence of conspiracy on the part of the respondent or that he knew that the law of the United States would be contravened. In any event, knowledge is to be distinguished from facilitating. Reference to *Pellecat v. Angell* (1835), 4 L.J.N.S. Ex. 326; *Hodgson v. Temple* (1813), 5 Taunt. 181.

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September 20. The judgment of the Court was read by HODGINS, J.A.:—Whether or not a conspiracy in Ontario to infringe the provisions of the United States' Eighteenth Amendment to its constitution and the Volstead Act by importing liquor into the United States is a conspiracy to commit a crime in a foreign country and as such taints the lease, the subject of this action, with illegality, this case fails on the facts. The suggested crime is only a crime within the United States, and whatever the plaintiff actually did in this country was legal and valid.

In *Rex v. Bachrack* (1913), 28 O.L.R. 32, the prisoner was charged with a conspiracy to procure an abortion beyond the jurisdiction of the Courts of this Province, and it was argued that there was no crime in that, or, if that were not so, then all evidence of attempts to commit and of the commission of the act beyond the jurisdiction was irrelevant and had been wrongly admitted, to the prisoner's prejudice. The jury having found that the prisoner did conspire in Ontario, Meredith, J.A. (now Chief Justice of the Common Pleas), said (p. 39) in giving the judgment of the Court:—

"If that had not been so, the question would have arisen whether a conspiracy to do a wrong, or commit that which would be a crime if committed in the country where the conspiracy was hatched, could be there punished if the act were to be done in some other country. . . . But it will be time enough to consider this interesting question when it has to be considered."

The facts of the case are simple: the plaintiff, on the 14th July, 1927, leased to the defendants a dock situate on the Detroit river. The defendants took possession and paid rent for over a year, and then vacated the property and refused to pay any further rent, notifying the plaintiff that, "the Government having stopped the supply of liquor from docks and wharves, we hereby give you notice under the provisions of the lease . . . that we desire to terminate the said lease and surrender up possession in three months from the 31st August, 1928."

The provision in the lease there referred to is: "with privilege to lessees to terminate this lease on three months' notice in event of liquor export business from docks and wharves being stopped by the Government."

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In the statement of defence it is set up, in paras. 7, 8, and 9, that the Lieutenant Governor in Council changed, altered, and amended the rules and regulations so as to deprive the defendants of the right to store in such warehouse and to export from such dock intoxicating liquors, and that the demise was therefore terminated pursuant to the provisions of the lease.

No evidence whatever in support of the statements made in these paragraphs was adduced, and consequently that defence fails. The contention advanced, however, was, as set out in para. 4, as follows:—

“4. The importation, purchase, sale, use, or other traffic of or in intoxicating liquors, was, at the time of such demise, and is now, a penal offence in, and is prohibited by and under an Act of the Congress of, the said United States of America, then and now in force therein, known as the Volstead Act, and the creation of such demise was intended to be in furtherance and in the advancement of, and the existence thereof is now intended to further and advance, a plan or conspiracy between the plaintiff and the defendants to violate the laws of the said United States of America and to induce the violation thereof by the citizens of the said United States of America.”

The evidence both as to the purpose of the alleged conspiracy and what was done under it, as well as to the law in the United States, is singularly weak. The plaintiff admitted that some years ago he built this dock for the purpose of its being utilised in the exportation of liquor; it was first leased to Labatt & Co., for whom the buildings were erected for the purpose of shipping beer. He was asked the following questions and made the following answers:—

“Q. You built a garage and warehouse on the dock in anticipation of renting it for storing liquor, and the premises were designed for that purpose? A. Absolutely.

“Q. How long did Labatt keep these premises for the storing and exporting of beer? A. I think about a year.”

The plaintiff was then asked about the negotiations for the lease, and in answer to the question, “What did the defendants say?” his answer is, “Nothing about exporting to any country at all.”

Samuel Harris, one of the defendants, asserts, in reference to conversations, that the plaintiff was told that they wanted to lease the dock for exporting liquor to the United States. The learned trial Judge does not accept his account and finds that no conspiracy as alleged is proved. And mere knowledge, if it were proven, does not seem to be equivalent to participation: *per Street,*

J., in *Hager v. O'Neil* (1891), 21 O.R. 27, at p. 31; and see also *S.C.* (1893), 20 A.R. 198, and *per Ferguson, J.*, at p. 202; and *S.C., sub nom. Clark v. Hagar* (1894), 22 Can. S.C.R. 510.

The evidence of Harris, however, as to how the so-called "exporting" was done is interesting. He says that the liquor first came in on flat cars, and they had it trucked to the warehouse, and when they had it in the warehouse they loaded it on boats, and Americans took it to the States then; that these boats mostly belong to American buyers. He further admits that, after having attempted to surrender this lease, he and his brothers proceeded to a dock farther down the river near Sandwich, and that they were at the time of the trial carrying on a business similar to the one that they conducted on the plaintiff's premises, saying: "Yes, export goes on at Sandwich just the same as it goes on at Ford City."

"Q. It is going on at your place of business? A. Yes."

From this it is quite apparent that there never was any purpose or intention that the defendants were to import liquor into the United States, nor is there any evidence at all of such importation or attempt to import. And it is importation into the United States that is prohibited there, as will be seen. Nor was there any suggestion that the lessor was to gain any profit on the liquor if it was actually imported into the United States, and the plaintiff was entitled to make out his case by production of the lease without disclosing any illegality. See *Hager v. O'Neil, supra*.

Whether or not the doing of acts which merely facilitate the acquisition by American citizens or others of liquor which they may or may not import into the United States may be urged as evidence of conspiracy, still conspiracy must be proved as a fact; and, in view of the failure to establish it in this case, it is unnecessary to pursue the question further.

Earlmont Dell (a practising attorney in the State of Michigan, U.S.A.), called for the defence, said that the Volstead Act and also an amendment to the United States Constitution known as the Eighteenth Amendment were in force in the United States. When asked what was the effect of the constitution of the United States as operative law in the United States, he answered: "It has the effect of prohibiting the importation, sale, and disposal of" (*sic*). Asked, "What does the Volstead Act provide?" he answered: "In general the Act prohibits the importation, sale, barter in, or dealing in liquors containing over one-half of one per cent. by volume of alcohol." He further stated that there was an additional law in the State of Michigan providing "for prohibiting importation, sale, dealing in or traffic in liquors of any intoxicating

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content," which prohibited importation and made it a felony under the law of the State of Michigan, punishable by fine or imprisonment in the House of Correction or in the State Prison, and that it was "in the same class" as murder. He was then asked a question founded upon this basis:—

Mr. Levin: "Suppose that a person who is not a citizen of the United States, a resident of alien territory, such as the Dominion of Canada, leases premises for the purpose of facilitating the exportation of liquor from Canada into the United States, supposing that person joins with another, who is able to assist him.— A. Where is he going to rent the property?

"Q. The Dominion of Canada? A. That persons joins with another for the purpose of procuring the importation of liquor into the United States in violation of legislation.

"Q. If a Canadian, what do you say as to the status of these two persons under the laws of the United States and Michigan? A. In my opinion that constitutes a conspiracy to violate the law of the United States and is an indictable offence."

I think that evidence of the kind I have quoted is wanting in legal precision and lacks any reference to authority on the question at issue, and that the opinion expressed is quite beside the mark, being based not on Canadian law but on that of the United States, and attempts to usurp the function of the trial Judge. The "opinion" of a lawyer alone does not prove the law—he must be in a position to testify that such is in fact the law.

I have come to the conclusion that no case is made out which would warrant any court in refusing the plaintiff relief. I entirely agree with the trial Judge that, "If a lease of this kind is against public policy in Canada, although the export of liquor is still permitted by the legislation and regulations of the Parliament of Canada, there is no evidence of export in fact to the United States contrary to the laws of that country, or of an intention between the parties to the lease to commit a breach of those laws."

Attention should be called to the, I hope, unusual wording of clause 3 of the formal judgment, that the amount of the damage is "to be assessed according to the principles laid down in the case of *Fitzgerald v. Mandas* (1910), 21 O.L.R. 312."

These words must be struck out, and for them will be substituted the words "to be assessed upon the basis that the defendants on the 29th August, 1928, wholly repudiated the contract contained in the said lease."

Appeal dismissed with costs.

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Sale of Goods—Conditional Sale—Goods Sold Affixed to Realty—Conditional Sales Act, R.S.O. 1914, ch. 136, secs. 3(4), 9—“Trader or other Person”—“Resale”—Assignment of Contract Price to Vendors—Knowledge—Estoppel.

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The C. company contracted with the defendants, a township corporation, to construct sewers in the highways of the township and through a parcel of land in which the defendants had the right, under an agreement, to construct a sewer. To enable the company to perform its contract, it agreed to buy the necessary sewer-pipes from the plaintiffs, and, to secure to the plaintiffs payment of the contract price, assigned to them the money payable by the defendants under the contract. Notice of the assignment was not given at the time nor until after the failure of the C. company and after the completion of the work had been undertaken by new contractors employed by the defendants. After all the pipes had been placed in position under the contract, the plaintiffs asserted a right to remove the pipes, the price not having been fully paid to them, and there being a provision in their contract with the C. company that the property in the pipes was not to pass to the latter unless and until the whole price was paid. No objection was taken to the validity of this contract, and it was duly registered under the provisions of the Conditional Sales Act, R.S.O. 1914, ch. 136:—

Held, that by the effect of sec. 3(4) of the Act the property in the pipes had passed to the defendants, notwithstanding that the plaintiffs had complied with the provisions of the Act.

The C. company was an “other person,” and the pipes were entrusted to it with the intention that the title should pass to the defendants, and this amounted to a resale, within the meaning of the statute.

The case was not governed by sec. 9 of the statute: where the property has passed by virtue of the provisions of sec. 3(4), sec. 9 cannot be invoked.

Held, also, that the contract price payable to the C. company by the defendants included in it, to the knowledge of the plaintiffs, the cost of the pipes; and, when the plaintiffs assented to the pipes being used in the construction of the sewer and took an assignment to themselves of the price to be paid and demanded, with knowledge of all the circumstances, the money payable under the contract, they became estopped from setting up a claim to the pipes as their own property.

AN appeal by the plaintiffs from the judgment of McEvoy, J., noted 36 O.W.N. 2.

The action was for an injunction restraining the defendants, the Municipal Corporation of the Township of York, from interfering with the plaintiffs in their alleged right to remove certain sewer-pipes which had been laid down in three different parts of the township by the Carson Construction Company, to whom the pipes had been sold by the plaintiffs under conditional sale agreements, and who had not paid for the pipes, and for a declaration that the plaintiffs were the owners of the pipes, and for other relief.

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Following *International Business Machines Co. Ltd. v. Guelph Board of Education* (1927), 61 O.L.R. 85, McEvoy, J., held that the Carson company was "a trader or other person" who resells the goods "in the ordinary course of his business," and that the case was governed by sec. 3 (4) of the Conditional Sales Act, as found in R.S.O. 1914, ch. 136; and he therefore refused to grant an injunction and declined to declare that the pipes were the property of the plaintiffs.

The assignments made by the Carson company to the plaintiffs of so much of the moneys payable to the Carson company under the contract with the defendants as might be necessary to pay for all the pipes as delivered, were held by McEvoy, J., to be valid, and he directed a reference to the Master to inquire and report what amount legally the defendants ought to have paid to the plaintiffs on account of the assignments after notice, reserving further directions and costs.

June 7. The appeal was heard by MULOCK, C.J.O., MAGEE, MIDDLETON, and FISHER, J.J.A.

John Jennings, K.C., for the appellants. The learned trial Judge erred in holding that there was a resale within the meaning of sec. 3 (4) of the Conditional Sales Act, R.S.O. 1914, ch. 136, and in applying *International Business Machines Co. Ltd. v. Guelph Board of Education*, 61 O.L.R. 85. All the contracts in question were completed before the 1st April, 1927. Therefore sec. 9 of the Act, as it appears in R.S.O. 1914, applies. The amendments contained in R.S.O. 1927, ch. 165, do not affect the claim, and because these amendments were found necessary by the Legislature the Act as it was before amendment should be interpreted much more in the appellants' favour. There was no resale by a trader in the ordinary course of business. The contractor was not a trader, and the sale, if there was one, was not in the ordinary course of business. The contract with the defendants was for the completed work, and nowhere is there any reference to the pipe at any specific price: *Agricultural Development Board v. De Laval Co. Ltd. and Brown* (1925), 58 O.L.R. 36; *Dominion Bridge Co. v. British American Nickel Corporation Ltd.* (1924), 56 O.L.R. 288, at p. 293. The onus rests upon the defendants to prove that the contractor was a trader, that there was a resale, and that the resale was in the ordinary course of business. There is no evidence of this.

A. E. Knox and *H. A. Hall*, for the defendants, respondents. The case comes within the cases *International Business Machines Co. Ltd. v. Guelph Board of Education* and *Agricultural Develop-*

ment Board v. De Laval Co. Ltd. and Brown, supra. The Mechanics' Lien Act applies. The Conditional Sales Act does not and was never intended to apply to a case such as this. In any event, the plaintiffs are estopped by their conduct in taking from the contractor assignments of the amounts due from the respondents.

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September 20. The judgment of the Court was read by MIDDLETON, J.A.:—An appeal by the plaintiffs from the judgment of Mr. Justice McEvoy, dated the 4th March, 1929, by which he found that the plaintiffs were not the owners of certain sewer-pipe in question in the action, and were not entitled to an injunction restraining the defendants from preventing the removal of the sewer-pipe from certain highways and other property in the township of York.

By the judgment it is referred to the Master to inquire as to any balance payable by the defendants to the Carson Construction Company Ltd. under the contract for the construction of the sewer, which moneys were assigned by the contractors to the plaintiffs.

The facts giving rise to this action are not complicated.

The Carson Construction Company Ltd. is an incorporated company carrying on the business of sewer construction.

On the 12th June, 1926, the Carson Construction Company Ltd. contracted with the Municipal Corporation of the Township of York for the construction of certain sewers upon the highways and through a parcel of land in which the municipality had the right, under an agreement, to construct a sewer.

To enable it to perform its contract, the company agreed to buy the necessary sewer-pipe from the plaintiffs; and, to secure to them payment of the contract price, assigned to the plaintiffs the money payable under the contract by the municipality. Notice of this assignment was not given at the time, nor until after the failure of the Carson Construction Company and after the completion of the contract had been undertaken by new contractors employed by the municipality. What sum, if anything, may ultimately be found payable to the plaintiffs is not yet found and forms the subject-matter of the reference directed by the judgment.

The contract price for the pipes supplied is said to be upwards of \$24,000, and \$12,000 was paid on account, leaving a balance of \$12,732 with interest at 8 per cent. under the terms of the agreement.

After all the pipe had been placed in position under the contract, the plaintiffs, in assertion of what they believed to be their rights, threatened to remove the pipe from its position upon the

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highway and the other property through which it was laid. This threat was resisted by the police under the instructions of the defendant corporation, and thereupon this action was brought, in which the plaintiffs claim a declaration of a right to remove the pipes, and ask an injunction to restrain the defendants, their servants and agents, from preventing or interfering with the removal of the pipe from the highway and other property. The plaintiffs also ask for an accounting to ascertain what, if anything, is due to them under their assignment.

The plaintiffs' claim is based upon the fact that, under the contract between them and the construction company, the property in the pipe in question was not to pass to the construction company unless and until the whole price was paid. No objection is taken to the validity of this contract, and it appears to have been duly registered as required by the provisions of the Conditional Sales Act.

What is contended, and this has been found by the learned trial Judge, is that by the effect of sec. 3, subsec. 4, of the Conditional Sales Act, R.S.O. 1914, ch. 136, which applies to the contract in question, the property in the pipe passed to the defendants, notwithstanding that the provisions of the Conditional Sales Act had been complied with.

This statute was passed for the protection of a person transacting business in the ordinary way with one to whom the goods had been delivered under the terms of a hire-receipt. If the delivery is made to a "trader or other person" for the purpose of resale by him in the course of business, a purchaser is in this way protected. It is sought to give to the statute a narrow meaning, and it is argued that the construction company is not a trader or other person, and that the goods were not delivered to the construction company for the purpose of resale, and, thirdly, that the transaction as between the construction company and the municipality did not amount to a resale.

In my view, this is giving altogether too narrow an effect to the statute in question. Even if the doctrine of *ejusdem generis* is regarded, I am of the opinion that the construction company is an "other person" within the meaning of the statute. The intention of the Legislature was to protect those who buy in good faith from one to whom the goods have been entrusted under such circumstances that a resale by him is contemplated. Unquestionably these goods were entrusted to the construction company for the purpose of enabling them to use them in the construction of the sewer.

It was argued that the contract was not a contract for the sale of the goods, but a contract for the construction of the sewer.

While this is in one sense so, it was unquestionably part of the contract that the title to the goods should pass to the municipality, and this amounts to a resale within the meaning of the statute. This view is, I think, in accordance with that entertained by this Court in *International Business Machines Co. Ltd. v. Guelph Board of Education*, 61 O.L.R. 85, affirmed in the Supreme Court of Canada, [1928] S.C.R. 200.

It was next argued that this case is governed by sec. 9 of the Conditional Sales Act, which provides that, where goods sold under a conditional sale have been affixed to realty, they shall remain the property of the vendor as fully as they were before being so affixed, but the owner of the realty shall have the right to retain the goods upon paying the balance due to the vendor. This argument entirely misapprehends the obvious effect of this section. It was passed to give to the vendor of goods, whose title was otherwise unimpeachable, the right to force the owner of the lands to which they have been affixed to pay the balance due, notwithstanding the fact that the goods had become fixtures—in effect to render inapplicable the decision of the Court of Appeal in England in *Hobson v. Gorringe*, [1897] 1 Ch. 182. Where the property has passed by virtue of the statutory provision already referred to, this section cannot be invoked.

I am also of opinion that the plaintiffs would fail for an entirely different reason. The contract price payable to the construction company by the municipality included in it, to the knowledge of the plaintiffs, the cost of the sewer-pipe; and, when the plaintiffs assented to this sewer-pipe being used in the construction of the sewer and took an assignment to themselves of the price to be paid, and demanded, with full knowledge of all the circumstances, the money payable under the contract, they are, I think, estopped from now setting up any claim to the pipe as their own property. As said by Lord Herschell, "They could not sue for the purchase-money and insist that the property in the goods, the price of which they were suing for, had not passed:" *McEntire v. Crossley Bros. Ltd.*, [1895] A.C. 457, 464.

Upon all these grounds I think the appeal fails and should be dismissed with costs.

Upon the argument attention was drawn to the unsatisfactory form of the judgment of reference. If the parties agree, this may be now rectified and the Master may be directed to add in his office all persons having any adverse claim to the balance remaining in the hands of the municipality so that the rights of all parties to it may be adjudicated upon.

Appeal dismissed with costs.

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[APPELLATE DIVISION.]

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Will—Construction—Disposition of Residue—Trusts—Income—Corpus—Bequests to five Sisters and to "Children" of Sisters—Whether Confined to first Generation—Use of Words "Parent" and "Issue"—Question as to Disposition of Corpus not Ripe for Decision—Effect of Codicils Confirming Will after Death of some Beneficiaries.

By his will, made in 1902, the testator, who died in September, 1927, gave the residue of his estate to his executors in trust to apply the net income for the term of five years from his decease equally among his five sisters (naming them), "that is to say, my said income is to be divided into five equal portions one of which is to go to each of my sisters aforesaid for the said term of five years. . . . And I direct my executors at the end of the said five years to hand over all my estate then in their hands to" a trusts company "to be invested by the said company . . . and the income from my said estate to be paid to my said five sisters . . . share and share alike, as long as they shall continue to live, and on the decease of any of them, leaving lawful issue, then I direct that the said trusts company shall expend the income which the parent would have received if living for the benefit of the children if any of my sisters so dying leaving lawful issue. But in case of the death of any of my said sisters without leaving lawful issue, then the income of my estate shall be divided among the residue, share and share alike, it being understood in all cases during the first five years or later that the children of any of my sisters dying shall get the share of the income which the parent would have received if living. And I desire that the said . . . trusts company shall so continue to hold my said estate until the death of all of my said sisters, and until the youngest child born to any of them shall have attained the age of twenty-one years, when I direct the said . . . trusts company to distribute my said estate in as many shares as there were sisters who died leaving lawful issue, and that my said estate shall be divided so that the children of each of my said deceased sisters shall get one share. The intention of my will being to provide an income for each of my said sisters during their life equally, and for their children after their decease, so that the income of the children of each sister shall be the income which their mother would have received if living. But when my sisters have all departed this life then that their children shall continue to receive the income which they would have received if living until the youngest of their children shall have attained the age of twenty-one years, when there shall be a division of my estate as aforesaid, the children of each sister receiving one share of the estate."

The testator, in January, 1927, added to his will two codicils, each containing a clause confirming the will.

When he made his will, the five sisters named were alive, but at the time of his death only three were alive. Of the two who pre-deceased him one (C.) had had two children, both of whom pre-deceased her, but one of them left a son, F., who survived the testator. The other deceased sister (S.) left two children, who survived the testator:—

Held, that the two children of S. were entitled to the share of the income which their mother would have taken but for her death.

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F., the grandson of C., took no share either of the income or of the corpus, unless the word "children," as used by the testator, included grandchildren.

The word "children" *prima facie* means the first generation and not remoter issue, and it was clear from the testator's use of that word and of the word "parent" that the testator meant children and not remoter issue (MAGEE, J.A., *dubitante*).

F., not being the actual child of a sister, did not take the share of the income which his grandmother would have taken if living. But she did not die without leaving lawful issue, and therefore the share of the income which she would have taken if living did not pass to the surviving sisters, and the testator died intestate as to it. Until all the sisters die, and until the youngest child born to any of them attains the age of twenty-one years, there is to be no distribution of the corpus: the happening of these two events is a condition precedent to the vesting of any share in any child who is under that age; and, should all the children of the sisters die under the age of twenty-one, there would be an intestacy as to the corpus. Therefore until the happening of the two events, the Court is unable to determine who is entitled to the corpus.

Discussion of the question whether "children" in the will could be construed as meaning "issue," and discussion as to the effect of the confirmation of the will by the codicils after the death of two of the sisters.

MOTION by the executors of the will of Thomas Saunders Hobbs, deceased, for an order determining certain questions arising in the administration of his estate as to the true meaning and effect of his will and codicils.

January 14 and February 3, 1928. The motion was heard by MIDDLETON, J.A., in the Weekly Court, Toronto.

R. G. Ivey, for the executors.

I. F. Hellmuth, K.C., and *Lyle Ramsey*, for Mrs. Edwards and Mrs. Ferguson.

The Hon. N. W. Rowell, K.C., for Miss Rhoda Hobbs and others.

D. W. Saunders, K.C., for Mrs. Kingsmill and Mrs. Puddicombe.

W. N. Tilley, K.C., and *A. J. Thomson*, for Harold Fishleigh.

Lewis Duncan, for the class of persons entitled to take in the event of an intestacy.

McGregor Young, K.C., the Official Guardian, representing infants and any unborn issue of the sisters of the deceased.

G. W. Mason, K.C., and *M. C. Hooper*, for Samuel F. Wood.

March 31, 1928. MIDDLETON, J.A.:—Thomas Saunders Hobbs, of the city of London, manufacturer, departed this life on the 30th September, 1927, having made his will bearing date the 19th March, 1902, and two codicils bearing date the 11th January, 1927,

Middleton, and the 27th January, 1927, which will and codicils were duly admitted to probate on the 9th November, 1927.

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1928. Upon this motion, several questions were submitted for decision; all of these, save one, admit of easy solution.

RE HOBBS. First, the testator gives to his sister Rhoda Hobbs, among other things, a policy of insurance in the Imperial Life Assurance Company of Canada for \$10,000. This was paid to him in his lifetime, so this specific legacy was deemed. The testator may have had this in his mind when by codicil he gave to her large benefits, \$25,000 and the house and furniture.

2. There is a gift of "income from business investments." Does this include the income from the whole estate? Counsel are agreed that it does, and in view of the complicated provisions of the will I agree, and it may be so declared.

3. By a codicil, sufficient stock in the Hobbs Manufacturing Company is given to Samuel F. Wood to give him, when added to his own holding, 51 per cent. of the outstanding stock in that company. The question asked is this: Has Mr. Wood the right to have the succession duty payable on this legacy recouped out of the estate? Was it the testator's intention that he should have this legacy free from this burden of succession duty? The duty is, *primâ facie*, payable by the legatee, and I can find nothing to indicate any intention to cast this burden upon the estate. It may be that such difficulty (if any) that Mr. Wood may be put to in raising this large amount—some \$60,000 it is said—was not present to the mind of the testator, but to relieve the legatee from the burden of this tax there must be a clear expression of such intention on the part of the testator.

4. The remaining question is exceedingly troublesome and concerns the interest (if any) of Mr. Fishleigh in the estate under the terms of the will.

The testator had one brother and five sisters. This brother had many children—eleven it was said. He died on the 17th January, 1927, a week after the first codicil and ten days before the second codicil. Neither he nor any of his children is named in the will. At the date of the will the five sisters were all living and all are named in the will. One was unmarried and is still unmarried, four were married. One of these had and still has no children.

In January, 1927, when the codicils were made, one of the married sisters had died, leaving children her surviving. One had died in 1918, having had two children, who are both dead, and one grandchild, Harold Fishleigh, whose claim has now to be considered.

It is unlikely that the unmarried sister or the married sister having no children will have children, and thus, when the provisions of the will are considered, the discussion really narrows itself to this: When the ultimate division takes place are there to be two shares of approximately \$750,000 each or three shares of \$500,000 each? Does Harold Fishleigh take a share or is there an intestacy as to the share set apart for his grandmother which his mother and his aunt or one of them would have taken had they survived the testator

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Turning now to the will. After the appointment of executors and the gift to Rhoda Hobbs, all the residue of the estate is given to the executors in trust with power to continue the testator's business for a period not exceeding five years, and after payment of debts the net income for these five years is to be divided equally between the testator's sisters—who are named—in five equal portions. At the end of the term of five years certain other legacies are to be paid, and the executors are to hand over the estate to a trust company and the income is then to be paid to the five sisters share and share alike, "as long as they all continue to live, and on the decease of any of them, leaving lawful issue, then I direct that the said trusts company shall expend the income which the parent would have received if living for the benefit of the children of any of my sisters so dying leaving lawful issue. But in case of the death of any of my said sisters without leaving lawful issue, then the income of my estate shall be divided among the residue, share and share alike, it being understood in all cases during the first five years or later that the children of any of my sisters dying shall get the share of the income which the parent would have received if living." The trust company is then directed to continue to hold the estate "until the death of all of my said sisters, and until the youngest child born to any of them shall have attained the age of twenty-one years, when I direct the said . . . trust company to distribute my said estate in as many shares as there were sisters who died leaving lawful issue, and that my said estate shall be divided so that the children of each of my said deceased sisters shall get one share. The intention of my will being to provide an income for each of my said sisters during their life equally, and for their children after their decease, so that the income of the children of each sister shall be the income which their mother would have received if living. But when my sisters have all departed this life then that their children shall continue to receive the income which they would have received if living until the youngest of their children shall have attained the age of twenty-one years, when there shall be a division of my estate as aforesaid, the children of each sister receiving one share of the estate."

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Caroline Fishleigh, one of the sisters mentioned by the testator in his will, died on the 9th September, 1919. She had two sons, Ernest Claude Fishleigh, who died on the 8th December, 1918, who had had one son, John Fishleigh, who died in infancy, and William Thomas Albert Fishleigh, who died on the 18th September, 1904, leaving him surviving Harold Fishleigh, Mr. Tilley's client upon this application. What, if anything, does he take?

The whole difficulty is occasioned by the use of the words "children" and "issue" in the will. "Issue" *primâ facie* includes all descendants; "children" *primâ facie* includes the first generation only and does not include grandchildren. It must also be borne in mind that the question to be discussed concerns the suggested lapse of the legacy by reason of the death of Mrs. Fishleigh and her two children during the lifetime of the testator. This is quite distinct from the problem presented where death takes place after the death of the testator.

It is, I think, desirable to discuss the exact provisions of the will before looking at any of the numerous cases referred to upon the argument. It is, in the first place, important to note that the word "issue" in this will is not used anywhere to describe those to whom either income or capital is given. It is uniformly used in the indication of an event in which a gift is made. In defining those to whom anything is given the word uniformly used is "children," and in some cases this word is coupled with the word "mother" or "parent."

After giving the income to the five sisters, there is this provision: "on the decease of any of them leaving lawful issue" the income "which the parent would have received" is to go to "the children" of any sister dying without leaving "lawful issue." This is followed by a provision covering the case of the death of "sisters without leaving lawful issue," when the share goes to the other sisters.

The first expository clause states the intention as to income to be that "the *children* of any of my sisters dying shall get the share of the income which the *parent* would have received if living."

With reference to capital. The period of distribution is fixed as the date when "the youngest child born to any of" the sisters attains the age of twenty-one, when there are to be as many shares created as there were "sisters who died leaving lawful issue" when "the children" of each of the said deceased sisters shall get one share.

The second expository clause reiterates the intention to provide the income for the five sisters for their respective lives and "for their children after their decease, so that the income of the

children of each sister shall be the income which their *mother* would have received if living." And these children are to have this income when the youngest of these children attains twenty-one. The intention as to capital is put laconically: "There shall be a division of my estate as aforesaid, the children of each sister receiving one share of the estate."

If, in all this, the words "die without leaving lawful issue" and "children" are given their strict meaning, there will be a share of both income and capital set apart for Mrs. Fishleigh, for she did not die without issue, but there is no effectual gift, for it is given to her children, and she and they had both pre-deceased the testator. So as to it, it seems to me, there must be an intestacy.

I do not at all suppose that this result is in accordance with the actual wish on the part of the testator. His intention was plainly to die testate as to his whole estate, and I take it to be the duty of the Court to attain that result if upon any fair reading of the will this can be accomplished, and I therefore proceed to examine the will and the decisions to see if I can find anything which would justify me in holding that the expressions used have some secondary meaning which can permissibly be given to them so as to avoid the result which I am satisfied the testator did not intend. Unless this can be accomplished intestacy must follow, not because the testator intended to die intestate but because he has not expressed any testamentary wish applicable to the circumstances that have actually happened. I can only construe the will as it is written, and I cannot supplement by now making provisions to meet unforeseen events.

The problem here presented is not at all the same as that faced by the Court of Appeal in *In re Edwards*, [1906] 1 Ch. 570, but there is a certain analogy, and the observations which I am about to quote from the judgment of Lord Justice Romer express, I think, the true principle applicable. There a testatrix gave all her property to trustees in trust for her children who attained twenty-one or married, with a gift over to other persons in the event of her death "without leaving any children surviving me." There was one child who did survive but who died an infant. It was argued that to avoid intestacy the condition of the gift over should be read as though it had been "without leaving any such children surviving me." Lord Justice Romer says (p. 574): "I am strongly of opinion that when you have clear words used by a testator, those words ought to be adhered to, unless there is something in the context which shews that a contrary effect ought to be given. I find here clear words . . . Those words are free from ambiguity, and I see nothing in this will which would

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enable me to say that those words ought not to be adhered to. It is said that the Court leans against an intestacy. I do not know whether that expression at the present day means anything more than this, that in cases of ambiguity you may, at any rate in certain wills, gather an intention that the testator did not intend to die intestate, but it cannot be that, merely with a view of avoiding intestacy, you are to do otherwise than construe plain words according to their plain meaning. A testator may well intend to die intestate. When he makes a will he intends to die testate only so far as he has expressed himself in his will." I would add that in many cases where a testator intends to die testate he may in fact die intestate because he has failed to make any provision in his will for that which has actually happened. This does not stand alone; for example, it was suggested by Lord Campbell, in *Wing v. Angrave* (1860), 8 H.L.C. 183, at p. 202: "A Judge is to construe, and not to make a will; and if an event has happened for which a testator has not provided, from not having foreseen it, although if he had foreseen it there is a strong probability that he would have provided for it in one particular way, his supposed wishes shall not prevail, *quod voluit non dixit*: we are to give effect to the expressed, not the conjectural or probable, intention of testators."

The will I am attempting to construe was prepared, I am told, by one of his Majesty's counsel of great experience. He must have known the difference between the expressions "issue" and "children." These are used in contrast uniformly throughout the whole will, and I do not feel at liberty to attribute to them any other than their normal significance. Moreover, the words "parent" and "mother" are used coupled not with "issue" but with "children;" and I can find no place in the whole will in which the word "child" or "children" could be read as "grandchild" or "grandchildren" without disorganising and demoralising the entire will. The words "child" and "children" are, it is true, flexible, but they are not as flexible as the word "issue." It would be comparatively easy to read "issue" as "children," but this would in no way help Mr. Fishleigh.

The case of *Sibley v. Perry* (1802), 7 Ves. 522, has been much criticised but I think unjustly. I do not discuss the facts of that case but content myself with giving its effect as stated by Lord Cozens-Hardy, M.R., in the judgment of the Court of Appeal in *In re Timson*, [1916] 2 Ch. 362, at p. 365: "It is an established rule that where the parent of issue is spoken of, the word "issue" is *prima facie* restricted to children of the parent." This rule is said to govern unless there is some context which induces the

Court to arrive at a different conclusion. Thus used, the rule is described (p. 366) as "a good rule, although, like other rules of the kind, its application may be cut down by the context of the will." This is of no value here save to shew how impossible it is to treat the word "children" as equivalent to "issue" because the former word is so coupled with the controlling words "parent" and "mother" that even if the word "issue" had been used it would probably have to yield to the context.

I have read a multitude of cases but refrain from discussing them, as I failed to find anything in them helping me, and little would be accomplished by enumerating them and pointing out why they have nothing to do with the matter now in controversy.

The result of this is that during the period in which this trust fund is to be held undistributed by the trust company the income is to be divided into five shares, and the share which would have been for Mrs. Fishleigh had she survived is to be distributed as upon an intestacy because the gift to the remaining sisters is only operative upon the death of a sister without leaving lawful issue. If either of the sisters who survived and who have no children die without leaving lawful issue their shares "will be divided among the residue," that is among the surviving sisters or their children.

When the capital comes to be divided, it is to be divided into as many shares as there were sisters who died leaving lawful issue, so that one share—probably one-third—would have to be set apart as representing Mrs. Fishleigh's at one time possible interest, and as to this there will be an intestacy.

As already indicated, I think different considerations apply to the case of the sisters who survive the testator. I think that many cases justify my holding that the words "die without leaving issue" mean "die without having had issue." This unfortunately does not help Mr. Fishleigh. In his case the same meaning must be attributed to the same words; but the unfortunate thing in his case is that there then is a gift to the children, and these children having pre-deceased the testator there is a lapse. In the case of those who survived the testator there is no lapse but a vested interest; the enjoyment postponed for the period named by the testator, namely, until the youngest child of any of the sisters attains majority.

One other matter should be mentioned—the effect of the codicil ratifying the will. Viewing this from every aspect, I cannot believe that it really has any bearing on the problems which I have to solve. It unquestionably makes it far more difficult to know what was in the mind of the testator. He unquestionably knew the family history and just how matters stood, but he does not appear

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to have given the problem presented any thought. I can conceive no reason why he should have left his grandnephew unprovided for, nor can I think it likely that he intended him to have so much more than any of the others standing in a similar relationship; but, as Lord Watson said in *Scalé v. Rawlins*, [1892] A.C. 342: "We are not at liberty to speculate upon what the testator may have intended to do, or may have thought that he had actually done. We cannot give effect to any intention which is not expressed or plainly implied in the language of his will." I could quote many similar references, but they would not help. It may well be that the true solution of the making of the codicil in its present form is that the testator intended to deal with the matters mentioned in the codicil only, leaving as sacrosanct the main body of his will, and that the confirmatory clause, though adopted by the testator, was really the work of the conveyancer.

This disposes, I think, of all the questions argued before me.

There remains only the questions of costs. The claim put forward by Mr. Wood appears to me quite without foundation, and I do not think I should give him any costs out of the estate, nor do I think that his claim has materially added to the costs of the motion. So, so far as he is concerned, there will be no costs. Subject to this, the costs of all parties may be well borne by the estate.

Harold Fishleigh appealed from the judgment of MIDDLETON, J.A.

June 18, 1928. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, and FERGUSON, JJ.A.

W. N. Tilley, K.C., and *A. J. Thomson*, K.C., for the appellant. The word "children" in the will means "offspring" and so includes grandchildren; and the words "lawful issue" are used in their technical sense and are not limited to "children." The word "children" is defined by the word "issue." The early gift to children must be construed with reference to the later gift over in the event of no lawful issue. The testator divided the estate into three shares, i.e., into as many shares as there should be sisters leaving lawful issue. If a testator knows that a sister is dead leaving no child but having a grandchild who is alive, then the grandchild takes under the word "children:" *Wyth v. Blackman* (1748), 1 Ves. Sen. 197; *Sibley v. Perry*, 7 Ves. 522; *Ross v. Ross* (1855), 20 Beav. 645; *Ralph v. Carrick* (1879), 11 Ch.D. 873, at p. 882; *In re Timson*, [1916] 2 Ch. 362; *In re Swain*, [1918] 1 Ch. 399; *Re Embury* (1913), 109 L.T.R. 511. The will should be read as of the date of the second codicil: *In re Champion*, [1893] 1 Ch. 101; *In re Rayer*, [1903] 1 Ch. 685; *In re Fraser*,

[1904] 1 Ch. 726; *In re Park*, [1910] 2 Ch. 322. At the date of that codicil the testator knew that Mrs. Fishleigh was dead leaving no children but one grandchild. He consciously divided the estate into three shares because of this circumstance. The word "parent" is used to identify the share only and not for the purpose of substitution. The gift is a direct one to the child or issue. The words "child" and "children" may be construed as issue generally to carry out the intention of the testator: *Harley v. Mitford* (1855), 21 Beav. 280; *In re Smith* (1887), 35 Ch.D. 558.

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The Hon. N. W. Rowell, K.C., for Rhoda Hobbs, Mrs. Ferguson, and Mrs. Field. It is not necessary to go beyond the will itself or adopt any particular rules of construction to ascertain what the testator really intended. The word "issue" is used in the colloquial sense of "children." The words "parent" and "children" are both used and have the effect of cutting down the meaning of "issue." That is the proper construction upon the authorities also. The cases already cited are to be distinguished because there is no gift to issue in any case. To get the meaning of the expressions used, the will must be read in the light of the circumstances at the time the will was drawn. The later confirmation did not change the meaning of the expressions originally used. It has never been held that a confirmation can have the effect of revoking certain legacies then effective and substituting others: *In re Park* (*supra*); *Sibley v. Perry* (*supra*); *Pruen v. Osborne* (1840), 11 Sim. 132; *Benn v. Dixon* (1847), 16 Sim. 21; *Ralph v. Carrick* (*supra*); *In re Atkinson*, [1918] 2 Ch. 138; *Re Smith* (1927), 61 O.L.R. 412; *In re Hopkins' Trusts* (1878), 9 Ch.D. 131; *Loring v. Thomas* (1861), 1 Dr. & Sm. 497. The word "issue" as used means "children" only. It is used throughout in association with "parent" or "children" or both.

I. F. Hellmuth, K.C., for Mrs. Edwards. There is no intestacy. The word "issue" must be read as "children." It is quite proper to read "issue" as children. It is quite contrary to the rule to read "children" as "issue." Reference to *Pride v. Fooks* (1858), 3 DeG. & J. 252; *Re Kirk* (1885), 52 L.T.R. 346; *In re Atkinson* (*supra*); *In re Smith* (*supra*).

D. W. Saunders, K.C., for Mrs. Kingsmill and Mrs. Puddicombe. The republication of the will by a codicil does not alter the meaning of the will. Reference to *In re Birks*, [1900] 1 Ch. 417; *Stilwell v. Mellersh* (1851), 20 L.J. N.S. Ch. 356.

McGregor Young, K.C., for the infant children of Mrs. Edwards and Mrs. Kingsmill. The shares of Mrs. Puddicombe are vested in the children by clause 4 of the will. If, however, Mrs.

App. Div. Puddicombe should predecease her children the argument made
1928. on behalf of the appellant might be adopted as the agreement on
 behalf of those children.

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Lewis Duncan, for the class entitled on intestacy. There is danger in the argument that "issue" should be construed as meaning "children." The Court should interpret the will as written in 1902. There is a vesting in the mother, but it may be divested in the event of her death, because there would then be issue but no children. That should not be if the normal construction of "issue" is put on the word. There is nothing in the will to indicate that "issue" should be cut down to mean "children" only and not "grandchildren." There is an intestacy in respect of Mrs. Fishleigh's share because of the doctrine of lapse. It does not form part of the residue: Wills Act, R.S.O. 1927, ch. 149, sec. 36. The estate is to be divided into three parts, and because there is no recipient of one share there is a lapse. There is no rule to compel a court to wrest the wording of the will from its natural meaning to prevent a part intestacy. Reference to Jarman on Wills, 6th ed., p. 203; *Davenport v. Hanbury* (1796), 3 Ves. 257; *Ross v. Ross* (*supra*); *In re Warren's Trusts* (1884), 26 Ch.D. 208, at p. 216; *In re Swain* (*supra*); *In re Edwards*, [1906] 1 Ch. 570, at p. 574; *Scalé v. Rawlins*, [1892] A.C. 342.

R. G. Ivey, for the executors.

September 20, 1929. MULOCK C.J.O.:—This is an appeal from the order of Middleton, J.A., construing the will and codicils of the testator Thomas S. Hobbs.

The questions involved in this appeal are: Who are entitled to share, and in what proportions—

(a) in the income of the residuary estate of the testator during the period of five years from his death,

(b) in the income thereafter until arrival of the time for distribution of the corpus,

(c) in the corpus?

The will bears date the 19th March, 1902, the following being the portions thereof which bear on the questions to be determined:—

"All the residue of my estate I give to my executors aforesaid in trust . . . to apply the net income . . . for the term of five years from my decease equally between my sisters Sarah Ann Field, Caroline Fishleigh, Elizabeth Mary Ferguson, Eva Puddicombe (wife of Robert Puddicombe), and Rhoda Hobbs, that is to say, my said income is to be divided into five equal portions one of which is to go to each of my sisters aforesaid for the said term of

five years . . . And I direct my executors at the end of the said five years to hand over all my estate then in their hands to the London and Western Trusts Company to be invested by the said company . . . and the income from my said estate to be paid to my said five sisters hereinbefore named share and share alike, as long as they all continue to live, and on the decease of any of them, leaving lawful issue, then I direct that the said trusts company shall expend the income which the parent would have received if living for the benefit of the children if any of my sisters so dying leaving lawful issue. But in case of the death of any of my said sisters without leaving lawful issue, then the income of my estate shall be divided among the residue, share and share alike, it being understood in all cases during the first five years or later that the children of any of my sisters dying shall get the share of the income which the parent would have received if living. And I desire that the said London and Western Trusts Company Limited shall so continue to hold my said estate until the death of all of my said sisters, and until the youngest child born to any of them shall have attained the age of twenty-one years, when I direct the said London and Western Trusts Company to distribute my said estate in as many shares as there were sisters who died leaving lawful issue, and that my said estate shall be divided so that the children of each of my said deceased sisters shall get one share. The intention of my will being to provide an income for each of my said sisters during their life equally, and for their children after their decease, so that the income of the children of each sister shall be the income which their mother would have received if living. But when my sisters have all departed this life then that their children shall continue to receive the income which they would have received if living until the youngest of their children shall have attained the age of twenty-one years, when there shall be a division of my estate as aforesaid, the children of each sister receiving one share of the estate."

The testator added two codicils to his will, dated respectively the 11th and the 27th January, 1927, and died on the 31st September, 1927.

By the earlier codicil he appointed two executors to his will to fill the place of two who had died, and added, "In all other respects I confirm my said will."

By the later codicil he gave to his sister Rhoda certain property in London and \$25,000, and to Samuel Francis Wood certain shares in the Hobbs Manufacturing Company, and added, "In all other respects I confirm my said will and codicil."

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When he made his will, the five sisters named therein were alive. At the time of his death, three of them, Mary Rhoda Hobbs, Mrs. Puddicombe, and Mrs. Ferguson, were alive, but his sisters Mrs. Field and Mrs. Fishleigh had predeceased him. Mrs. Field left two children, Eve and Winnifred, who survived the testator.

Mrs. Fishleigh had had two children, both of whom predeceased her, one of them, Albert, left a son, the appellant Harold Fishleigh. Mrs. Puddicombe at the present time has two children.

Numerous authorities were cited for the purpose of assisting the Court in its effort to ascertain the testator's intention, but where, as here, the intention may be ascertained by giving to the testator's language its ordinary meaning, a microscopical research to discover some other meaning serves no useful purpose. In my opinion the testator's words admit of no ambiguity the interpretation of which could be aided by the interpretations which learned Judges have given to other wills not in the identical language of the present one.

Turning then to the will: It discloses a scheme for disposing of the income of the estate until the corpus is to be distributed, and then for its distribution. The testator gives nothing but income to his sisters. During the first period of five years from his death "the income is to be divided into five equal portions one of which is to go to each of my sisters aforesaid for the said term of five years."

Two of his sisters, Mrs. Field and Mrs. Fishleigh, had predeceased the testator, but the survivors' shares of the income for the first term of five years being limited to one-fifth each, the one-fifth that each deceased sister if living would have taken lapsed, unless the will otherwise provides.

The testator deals with the case of the death of his sisters during the first period of five years as follows:—

"It being understood in all cases during the first five years or later that the children of any of my sisters dying shall get the share of that income which the parent would have received if living."

Mrs. Field, who predeceased the testator, left her surviving two children, and they are entitled to the share of the income which their mother would have taken but for her death.

They do not take through their mother, but directly from the testator.

Mrs. Fishleigh and her two children having predeceased the testator, her grandson Harold Fishleigh took no share either of the income or of the corpus, unless the word "children" as used by the testator includes grandchildren.

The word "children" *prima facie* means the first generation and not remoter issue. That the testator throughout the will used it in this sense is, I think, abundantly clear. He directs that "in all cases during the first five years or later, the children of any of my sisters dying shall get the share of the income which the parent would have received if living." "Parent" means father or mother, not grandfather or grandmother; thus children, not remoter issue, are to take the income which the deceased sister of the testator but for her dying would have taken. Further, in the last expository clause in his will, evidently *ex abundanti*, he adds: "The intention of my will being to provide an income for each of my sisters during their lives equally, and for their children after their decease, so that the income of the children of each sister shall be the income which their mother would have received if living." That is, those to take must be children whose mother is a sister of the testator.

I therefore am of opinion that Harold Fishleigh, not being the actual child of a sister, does not take the share of the income which his grandmother would have taken if living.

Then what becomes of Caroline Fishleigh's share of the income? The testator says that "in case of the death of any of my said sisters without leaving lawful issue, then the income of my estate shall be divided among the residue share and share alike."

Mrs. Caroline Fishleigh left her surviving her grandson Harold Fishleigh. "Lawful issue" includes grandchildren; thus she did not die without leaving lawful issue, and therefore the share of the income which she would have taken if living did not pass to the surviving sisters, and the testator died intestate as regards it.

The next question to determine is with reference to the corpus. Until all the sisters die, and until the youngest child born to any of them attains the age of twenty-one years, there is to be no distribution of the corpus. In my opinion the happening of those two events is a condition precedent to the vesting of any share in any child who is under that age; and, should all the children of the sisters die under the age of twenty-one years, there would be an intestacy as to the corpus.

I therefore think that until the death of the sisters and until the youngest child attains its majority or dies, the Court is unable to determine who is entitled to share in the corpus.

Costs out of the estate.

MAGEE, J.A. :—Appeal from the order of Mr. Justice Middleton construing the will and codicils of Thomas Saunders Hobbs, deceased, on the application of the executors thereunder.

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App. Div. Mr. Hobbs was unmarried. He died on the 30th September,
1929. 1927, leaving a will dated the 19th March, 1902, with two codicils
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Magee, J.A. At the date of the will in 1902, he was a man of considerable
means, a manufacturer and merchant residing at London in
Ontario. He then had living five sisters and one brother. Of the
sisters, one, Mrs. Ferguson, was a widow without issue, another,
Miss Rhoda Hobbs, was unmarried, another, Mrs. Field, was mar-
ried, with a daughter and son born in 1878 and 1880. Another
sister, Mrs. Fishleigh, was married, with two sons Ernest and
William, the latter born in 1874; and the fifth sister, Mrs. Puddi-
comb, was married, with two daughters. The brother, William R.
Hobbs, was married and had nine children then surviving, one
having died without issue. One of the daughters was married,
and then had two children, born in 1898 and 1899.

Having these relatives living, Thomas S. Hobbs made his will
of 1902. Thereby, after appointing two executors and giving to his
unmarried sister certain life insurance and mining stocks and
household effects and a farm and personal property connected
therewith, he gave all the residue of his estate to his executors in
trust to realise sufficient thereof to pay his debts and funeral
expenses, but with power to continue to hold his stocks in joint
stock companies or to continue his business for a period not exceed-
ing five years from his death, and after payment of all his debts
to apply the net income received from his said business invest-
ments, including eight named companies, for the term of five years
from his decease equally between his sisters (naming the five).
That is, his said income was to be divided into five equal portions
one of which was to go to each of his said sisters for the said term of
five years and at the end of such five years to pay three legacies of
\$2,500 each to named legatees and to hand over all his estate
then in their hands to the London and Western Trusts Company
Limited, to be invested by that company under the direction of his
said executors. The will then proceeded as follows:—

“ . . . and the income from my said estate to be paid to
my said five sisters hereinbefore named share and share alike as
long as they all continue to live, and on the decease of any of them,
leaving lawful issue, then I direct that the said trusts company shall
expend the income which the parent would have received if living
for the benefit of the children of any of my sisters so dying leaving
lawful issue. But in case of the death of any of my said sisters
without leaving lawful issue, then the income of my estate shall
be divided among the residue, share and share alike, it being
understood in all cases during the first five years or later that

the children of any of my sisters dying shall get the share of the income which the parent would have received if living. And I desire that the said London and Western Trusts Company Limited shall so continue to hold my said estate until the death of all of my said sisters, and until the youngest child born to any of them shall have attained the age of twenty-one years, when I direct the said London and Western Trusts Company to distribute my said estate in as many shares as there were sisters who died leaving lawful issue, and that my said estate shall be divided so that the children of each of my said deceased sisters shall get one share. The intention of my will being to provide an income for each of my said sisters during their life equally and for their children after their decease, so that the income of the children of each sister shall be the income which their mother would have received if living. But when my sisters have all departed this life then that their children shall continue to receive the income which they would have received if living until the youngest of their children shall have attained the age of twenty-one years, when there shall be a division of my estate as aforesaid the children of each sister receiving one share of the estate."

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The two codicils do not affect the wording of the will as to the division of the residuary estate or the income therefrom. The first codicil appoints three executors in place of the two named in the will who had both died; and by the second codicil the testator made additional gifts to his sister Rhoda of a house and lot in London, with its contents and furnishings and a sum of \$25,000, and made a bequest of shares in a company to Samuel F. Wood, but to each codicil is added the not unusual clause that in all other respects he confirmed the will. There is however no indication in either codicil that there was in fact any reading over or consideration of the wording of the will or any necessity for its perusal, and it may well be that the words in the codicils confirming the will were only inserted as a matter of course by the draughtsman; but they must be taken as the words of the testator.

Besides the death of the executors, changes had taken place among his relatives. Mrs. Sarah Ann Field had died in 1915, leaving her son Ewart Field and her daughter Eva, then Mrs. Harvey. Mrs. Caroline Fishleigh had died in 1919, leaving as her only surviving issue one grandson, Harold Fishleigh, born in 1903, the only child of her son William, who had died in 1904, her other son Ernest having predeceased her in 1918, leaving no surviving issue. William Fishleigh, father of Harold, had married in July, 1902. He had received his business training with the Hobbs Hardware Company but had started business for himself in Hagersville.

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Between the dates of the two codicils the testator's brother William R. Hobbs, who was also a prominent manufacturer and merchant in Toronto, had died in January, 1927, leaving three sons and five daughters and a son and daughter of another daughter who had died in 1908.

The testator thus left him surviving three sisters, Mrs. Ferguson, Mrs. Puddicombe, and Miss Rhoda Hobbs, and two daughters of Mrs. Puddicombe, two children son and daughter of his deceased sister Mrs. Field, and one grandson of his deceased sister Mrs. Fishleigh, besides the issue of his deceased brother William. His estate as valued for succession duty exceeded \$1,100,000. The only real estate was that devised to his sister Rhoda, so that we have to deal only with the question of personal estate.

The executors applied for the opinion of the Court upon several questions, some relating to the legacies to S. F. Wood and to Rhoda Hobbs, but the only questions involved in this appeal are: (1) whether Harold Fishleigh was entitled to a share of the income under the terms of the will; and (2) into how many shares is the corpus of the residuary estate to be divided upon final distribution thereof and who are the persons entitled to such shares?

The order of Mr. Justice Middleton, so far as material on this appeal, declares (a) that Harold Fishleigh is not entitled to a share of the income payable under the will and there is an intestacy as to the one-fifth share of such income to which Caroline Fishleigh or her children would have been entitled had she or they survived the testator, and (b) that the corpus of the residuary estate is to be divided into three equal parts and those entitled thereto are (1) the children of Eva Puddicombe, (2) the children of Sarah Ann Field, and (3) the next of kin of the testator, to be determined as of the date of his death, and that the shares of the children of the said Eva Puddicombe and of the said Sarah Ann Field became vested upon the death of the testator. The order also declared that the gift of the income from his business invest-

ments included the income from all his residuary estate, and this is not appealed from.

From this order Harold Fishleigh appeals, and the two sisters, Mrs. Ferguson and Miss Rhoda Hobbs, and Mrs. Harvey and Ewart Field, the daughter and son of Mrs. Field, deceased, also appeal, all protesting against there being intestacy as to any part of the estate, and Harold claiming that he is entitled to one-fifth of the income and corpus and the others claiming that the income should be divided into four shares, not five, and the corpus into two shares, not three.

There are three general subject-matters in question, namely, the disposition of the income of the residuary estate for the first five years, the disposition of the income thereafter till the period of division of the corpus, and the disposition of the corpus itself.

It is convenient, if not indeed necessary, to consider first the income after the five-year period. It is given to the five sisters, share and share alike, so long as they all continue to live. Then on the decease of any of the sisters leaving lawful "issue" her "children" are to have the benefit of the income which the "parent" would have received. But in case of any of the sisters dying without leaving lawful "issue" then the income of his estate is to be divided among "the residue." The will goes on to declare the intention to be to provide an income for each of the sisters during her (their) life and for her (their) children after her decease so that the income of her children shall be the income which their mother would have received if living, but when the sisters have all died then "their children" shall continue to receive the income which they would have received if living until the youngest of their children shall have attained the age of twenty-one years, when there is to be a division of the estate. The wording of the will as to that division has also to be borne in mind in relation to the income. The estate is to be held until the death of all the five sisters and until the "youngest child born to any of them" shall have attained the age of twenty-one years, and then the estate is to be distributed in as many shares as there were sisters who died leaving issue, and shall be divided so that the children of each of his "said deceased sisters" shall get one share and then at the end is added, "the children of each sister receiving one share of the estate."

One thing would seem manifest—that the testator did not contemplate any intestacy as to any part of his estate. He let the will remain unchanged for those many years and then twice confirmed it in 1927. He evidently thought he was disposing of it all. But the difficulty arises over the use of the word "issue," which would include grandchildren, and which is repeated as to both income

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App. Div. and corpus with the repeated word "children" and the words
1929. "parent" and "mother." It is said that, the will having been
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with full opportunity for consideration of what was written. The
absence of the phrase "child or children" would make one more
ready to consider that the word "children" was used in a general
sense. Personally I would be inclined to attach more weight to
the use of the word "issue" by a professional draughtsman as
being deliberate than to the other words. However we have to deal
with them all. We can find a similar phrasing even in the Wills
Act. By sec. 5, a married woman between 1859 and 1873 was
empowered to devise or bequeath her separate property to or among
her child or children, issue of her marriage, and failing there
being any issue then to her husband or as she might see fit. Thus
if "children" did not mean "descendants" a wife could not will to
her husband or her grandchildren or any one else if she hap-
pened to leave only grandchildren because there would be no chil-
dren and no failure of issue. Here the contention is that, although
Mrs. Fishleigh left issue, her grandson Harold, yet he cannot take
under the will because the word "children" cannot be construed
to include grandchildren or other descendants, and she was not
his "parent" or "mother."

We find many instances of Biblical use of the word "children"
in the sense of descendants and "mother" in the sense of ances-
tress; but ordinarily a gift to children of a person would not be
construed to be a gift to grandchildren or other issue.

In *Radcliffe v. Buckley* (1804), 10 Ves. 195, the will gave
the residue to the children of four deceased brothers and a deceased
sister of the testator to be divided among them in their respective
parents' shares. None of the sister's children were then living, but
there were several of her grandchildren and some great grand-
children, and it was held that they were not entitled to share, and
the Master of the Rolls pointed to the absence of any word "issue"
and said that the residue was so given that no part would lapse
and cause intestacy.

In *Pride v. Fooks*, 3 DeG. & J. 252, the will gave the residue
to such child or children as two nephews and a niece should re-
spectively leave, one-third to the child or children of each, and if
only one child all to that child, and if any one of the three left
no children or child that third was to go to the children or child
of the other or others leaving children or a child; and in case all
died without leaving any issue then the whole residue was to go
to children of the testator's stepdaughter. The two nephews died

without issue, the niece left only grandchildren—the residue was claimed by those grandchildren and by the stepdaughter's children and by the testator's next of kin. On appeal from the Master of the Rolls, it was held that "child or children" did not mean "descendants," that "any issue" did not mean "such issue," and hence there was an intestacy and the next of kin were entitled.

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In *Moor v. Raisbeck* (1841), 12 Sim. 123, one-third of a fund was given to such of the children of an aunt of the testatrix's husband as should be living at the decease of the testatrix, equally if more than one, and two other thirds similarly to others. The aunt had no child living but only grandchildren. Shadwell, V.-C., held that there was nothing in the will making it necessary to construe "children" to include the grandchildren and said that the testatrix had in several instances used the word in its proper sense and he was not at liberty to put a different construction on this part where the aunt's children were spoken of.

In each of these three cases, the Court found good reason on the face of the will for the limited construction, but in each it was conceded that the word might in a proper case be given a wider meaning.

On the other hand, in *Crook v. Brooking* (1688), 2 Vern. 50, it was said that if the gift be to the children of the person dead at the date of the will who has left grandchildren but no children then living, and if the testator was aware of that, that laid the ground for construing the word to include grandchildren or descendants.

In *Fenn v. Death* (1856), 23 Beav. 73, the will gave a residue to the children of T. or such of them as should be living at the testator's decease, and if more than one such child then to be equally divided between them. T. had died long before, and all his children were dead at the date of the will, but there were grandchildren and great grandchildren, and it was held that the grandchildren took all.

In *Berry v. Berry* (1861), 3 Giff. 134, 9 W.R. 889, after a devise to the children of the testator's late brother John in equal shares, and if only one to that one, and a bequest to the issue of John in equal shares and if only one child of John then to such only child, there was a gift of the residue to and in equal shares among the children of John living at the testator's wife's decease. At the testator's death, John's children were dead, but there were grandchildren, and Stuart, V.-C., citing various authorities, held that the grandchildren of John took the residue, the word "issue" helping out this decision, and it was a proper course to prevent total failure of the gift.

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In *In re Smith* (1887), 35 Ch.D. 558, the testator gave a one-sixth share of the residue to the children of his sister who should be living at his death and similarly one-sixth to the children of two brothers and three other persons. At the date of the will there were no children of the sister, but there were two grandchildren. It was held by Kay, J., that "children" was used in the sense of offspring, and so the grandchildren were entitled. Before that case, in *Re Kirk* (1885), 52 L.T.R. 346, there was a trust to divide the residue into four shares and pay one-quarter to the children of the testator's late brother James and similarly one-quarter to the children of two other brothers and a nephew. James had three children, all of whom had died before the will, as the testator knew, but there were grandchildren and great grandchildren of James living at the testator's death. Pearson, J., considered that there was nothing to shew that a wider meaning of the word "children" was intended, that the rule was to take the literal meaning except upon proper construction of the will itself, and that the judgment in *Berry v. Berry* was not happily worded, and he held that there was an intestacy.

In *In re Atkinson*, [1918] 2 Ch. 138, there was a bequest for such of the children of three deceased cousins as should be living at the death of the testatrix and if all dead then for such remoter issue *per stirpes* as should then be living, and the residue to such of the children of four late uncles and aunts as should be living at her death. At the date of the will there were no children of any of the four living, but there were grandchildren and remoter issue. Younger, J., pointed out that the will drew the distinction between children and remoter issue and said that the alleged rule that if there were no children at the date of the will the grandchildren could take would require a decision by the House of Lords, and thought *Crook v. Brooking* hardly deserved the attention paid to it, and that *Re Kirk* established the true limit and there was no hard and fast rule. That case, however, did not require the application of the rule to which he took exception.

Here we find three strong circumstances in favour of construing children as meaning issue—the consistent manifest intention against intestacy, the gift over to the other sisters and their children only if there were not issue of the sister dying, and the fact that when he confirmed his will there were no living children of Mrs. Fishleigh. Against these we have the direction that the children were to take the parent's share or mother's share, but if by children was meant "issue" then those words "parent" and "mother" were manifestly more familiar words than "progenitress" or "ancestress," or some longer phrase, and referred to the sister dy-

ing and leaving issue and whose issue was thus to share. I do not overlook the fact that it is not a case of inheritance from the deceased sister but of a gift after the sister's life-interest. If sitting in a court of first instance, I should be inclined to the view that the word "children" meant issue and included grandchildren, but I find myself in the position of the Lord Chancellor in *Sibley v. Perry*, 7 Ves. 522, where, considering the whole will and the wording of gifts to others, he inclined to the opinion that the testator by a gift to issue meant children, but he added (p. 532): "I have not so much confidence in my opinion, to have altered the contrary determination, if it had come before me upon appeal." I therefore would affirm the judgment appealed from as to the income after five years.

As to the income for the first five years that was at first given absolutely to the testator's sisters, and if the interpretation of the will as to the subsequent income is that "children" does not include grandchildren, then the grandchildren cannot take the five years' income.

As to the corpus of the estate it is not to be divided until all the five sisters shall have died and the youngest child of any of them shall have attained the age of twenty-one years. The effect of this is that the shares do not vest until the death of the last surviving sister—assuming that there will not be children hereafter born to any of them. If any one of the sisters now living should survive her children and leave only grandchildren, then as to that share of the estate there will be an intestacy just as in the case of Mrs. Fishleigh.

The present judgment therefore in declaring that the estate is now divisible should be varied and no declaration at present made or only a declaration of the contingency.

Under the circumstances, as the questions have arisen through the testator's wording of his will, the costs of all parties should be paid out of the estate.

HODGINS, J.A., agreed with the Chief Justice.

FERGUSON, J.A., died while the case was standing for judgment.

Judgment below varied.

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HARWOOD AND COOPER v. WILKINSON.

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Contract—Illegality—Defence to Action on Covenants in Mortgages—True Consideration—Contemplated Breaches of Statute-law of Canada and Ontario—Smuggling Intoxicating Liquors into Foreign Country in Breach of Law of that Country—Proof of Foreign Law—Conflicting Judicial Views as to Illegality—Failure of Plaintiff to Answer Proper Questions upon Examination for Discovery—Contempt of Court—Rule 331—Dismissal of Action—Costs.

In an action upon the covenants for payment contained in two mortgages made by the defendant in favour of the plaintiff C., it was found upon the evidence that the real consideration for the advances made by C. in respect of which the mortgages were professedly made was the defendant's participation in a scheme which involved the defrauding of the Government of Canada in the matter of sales-tax or income-tax, and the smuggling of intoxicating liquor into the United States:—

Held, that to establish the illegality of an agreement it is not necessary that the illegality should be an integral part of it—it is enough if one of the parties contemplated an illegal act or transaction and that the other party was aware of it.

Lightfoot v. Tenant (1796), 1 Bos. & P. 551, followed.

So far as the agreement in this case contemplated breaches of the statute-law of Canada or of Ontario, it was unquestionably illegal. So far as the agreement contemplated activities having to do with the smuggling of liquor into the United States, the law of that country was proved at the trial of this action, but there were conflicting judicial views as to illegality.

The actual decision of the Court in *Walkerville Brewing Co. v. Mayrand* (1929), 63 O.L.R. 573, did not turn upon the illegality of the agreement, but upon the absence of proof of the law of the United States; and the views upon the question of illegality expressed in that case by HODGINS and GRANT, JJ.A., were in conflict with those of LAWRENCE and SANKEY, L.J.J., in *Foster v. Driscoll*, [1929] 1 K.B. 470.

The trial Judge in the present case, preferring the views of the Lord Justices, found the agreement illegal upon both grounds, and dismissed the action.

Upon the ground also that the plaintiff C. had refused to answer proper questions put to him on his examination for discovery, and was thus guilty of contempt of court, the action should be dismissed: Rule 331; *Republic of Liberia v. Roye* (1876), 1 App. Cas. 139.

The defendant, having taken part in the illegal transactions, was left to pay his own costs of the action.

ACTION upon the covenants for payment contained in two mortgages executed by the defendant in favour of the plaintiff Cooper. The action was originally brought by Harwood as assignee of Cooper, and Cooper was afterwards added as a plaintiff.

The action was tried before RANEY, J., without a jury, at Sandwich.

E. C. Awrey, K.C., and B. H. Furlong, for the plaintiffs.

F. D. Davis, K.C., for the defendant.

September 20. RANEY, J.:—The plaintiff Cooper was for several years engaged in the lucrative and adventurous business of importing liquors into the United States, his headquarters being at Belle River, in Essex county, a few miles north of Windsor. The plaintiff Harwood was one of his business associates. The defendant Wilkinson, before he became associated with Cooper, was a fisherman and was and is also a resident of Belle River.

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The action, which was originally brought by Harwood, as assignee of Cooper, is on the covenants in two mortgages made by Wilkinson to Cooper, one for \$5,000 dated the 21st December, 1922, carrying interest at 6 per cent. per annum, and the other for \$12,500 dated the 26th February, 1926, with interest at 7 per cent. per annum, against which a credit is allowed of \$3,703.

By his affidavit of merits, the defendant alleged that about the beginning of 1922 he entered into an agreement with the plaintiff Cooper, under which an ocean vessel was to be purchased for the purpose of carrying on the importing of intoxicating liquors into Montreal, and the exporting of liquors from Montreal to New York, and the importation of liquors into Ontario and other Provinces of Canada; and that under the said arrangement and in order to avoid liability in the carrying on of the said business Cooper caused the said vessel to be transferred to him, Wilkinson, and registered in his name, and that this arrangement was made in order that Cooper and others acting for him might evade payment of the Dominion sales tax and other liabilities upon their business, and in order illegally to carry on the business of importing liquor into Ontario and other Provinces; and that the moneys which are claimed in this action were advanced to the defendant on the understanding that they would never be collected if the defendant allowed his name to be used in the carrying on of the said business; and that the said moneys were the amount the defendant was to receive from the liquor business as his share for undertaking the risk and responsibility of being registered as owner of a vessel engaged in the said business.

The defendant further alleged that the said business was afterwards carried on and that the defendant became and remained the registered owner of the said vessel until about the year 1927, when it was transferred to other persons; and that the plaintiff Harwood was a mere nominee of the plaintiff Cooper, and had no financial interest in this action, but was acting as agent for Cooper, and that no notice in writing of any assignment from Cooper to Harwood had been given to the defendant before the commencement of the action.

The evidence disclosed that Wilkinson purchased a house at

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Belle River early in November, 1922, Cooper having agreed to advance to him for that purpose \$5,000, which was the full purchase-price of the house. The money was advanced by Cooper without any security at the time from Wilkinson; but, after the Wilkinsons had moved into their new home, and before the mortgage was made to secure the advance, Cooper approached Wilkinson with a proposal that Wilkinson should consent to the registration in his name of the ship "Bernard M." which was to be employed by Cooper and his associates in the liquor business. After some hesitation, because of the risks he feared he might incur, Wilkinson consented, and the ship was accordingly transferred by bill of sale to Wilkinson, and a mortgage given back to Cooper for the full nominal purchase-price, and the vessel was then registered at Halifax in Wilkinson's name. In June, 1924, the name of the ship was changed to "Fred B.," and in July, 1924, there was apparently a bill of sale of the ship from Wilkinson to one Charles K. Stewart, who appears to have been a member of the syndicate which was the real owner of the vessel. But, according to a notice from the American Bureau of Shipping, addressed to Wilkinson in February, 1927, the ship was on that date still registered in Wilkinson's name.

Following the advance of the \$5,000 in November, 1922, and the making of the mortgage to secure that advance on the 21st December, Cooper persuaded Wilkinson to go into the retail hardware business in Belle River. When Wilkinson objected that he had no money, Cooper answered, "Never mind, I have plenty of money; the boat will take care of that." Then between Christmas of 1922 and the first of January, 1923, Cooper took Wilkinson to the Hobbs Hardware Company's warerooms at London and there purchased a bill of hardware amounting to between \$6,000 and \$7,000. At London he told the representatives of the Hobbs company that he was giving Wilkinson a stock of hardware and to one of them he added it was for work and favours Wilkinson had done for him. In all, Cooper advanced \$12,500 to Wilkinson for the hardware business for which promissory notes were given from time to time by Wilkinson and his wife, the earliest being dated the 2nd January, 1923, and the latest the 10th June, 1924. No money was apparently advanced by Cooper to Wilkinson after the execution by Wilkinson of the bill of sale of the ship in July, 1924. The promissory notes were without interest, but the mortgage for \$12,500, which is dated February, 1926, was made collateral to the notes and carried interest as above stated at 7 per cent.

After the affidavit of merits Cooper was joined as a co-plaintiff in the action.

Cooper, no doubt, expected large profits from the activities of the vessel. Whether the profits were realised does not appear, but no attempt appears to have been made by Cooper to collect instalments either of principal or interest, whilst Wilkinson was registered as owner of the ship, and, speaking to the representative of the Hobbs company after he had started to press for payment from Wilkinson, Cooper explained that he would have left the business with Wilkinson, but for that _____ woman of his. At all events after Wilkinson had served Cooper's purpose Cooper began to press for payment of his advances.

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Though I accept the evidence for the defence, I do not think it establishes an agreement legally binding upon Cooper to forgo collection of the mortgages; but counsel for the defendant argues that the moneys advanced by Cooper to Wilkinson were advanced for an illegal purpose, and subject to being paid back out of the profits of an illegal business, if there were any profits. I think both of these statements are supported by the evidence, and it is of no consequence, as bearing on the question of the legality or illegality of the arrangement between Cooper and Wilkinson, whether there were actually any profits or not. Obviously the advances made by Cooper to Wilkinson were not ordinary business transactions. I am satisfied that the real consideration for the advances made by Cooper was not the securities given by Wilkinson, but was Wilkinson's participation in Cooper's scheme, which involved: (1) the defrauding of the Government of Canada in the matter of sales or income tax (one or the other, it is not very clear which, perhaps both); (2) the smuggling of liquor into the United States.

If Wilkinson had declined in November, 1922, to assist Cooper in his smuggling operations by complying with his request to take registration of the "Bernard M." in his name, is it at all probable that Cooper would have made the easy terms he did with Wilkinson in December, 1922, for the repayment of the advance of \$5,000 on mortgage, or that he would have advanced \$5,000 more without interest in January, 1923, to buy a stock of hardware for Wilkinson, as a gift to him for favours conferred, as he told Mr. Sippy? Or, indeed, would Cooper have advanced the full purchase-price of the house except for the scheme he had in mind, to use Wilkinson as a cat's paw? Or if Wilkinson, any time after December, 1922, had insisted on re-conveying the vessel before Cooper was ready to take the registration of it off his hands, is it probable that Cooper would have gone on during the following months advancing him \$7,500 more, without interest, for his hardware business? I have no doubt that Wilkinson's acquiescence and subservience to Cooper

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were a *sine quâ non* of Cooper's generosity. I accept Wilkinson's statement that Cooper promised him that the first mortgage and the later notes would be taken care of in whole or in part by the profits of his smuggling operations. Men of Cooper's profession do business in their line as far as possible by word of mouth. They shy at pen and paper. There is therefore nothing in the fact that the mortgage and the promissory notes have on their face the appearance of ordinary business transactions, and that there is no writing evidencing the relationship of the mortgages to Cooper's illegal scheme and practices.

By way of confirmation of Wilkinson's evidence of Cooper's illegal purpose so far as the "Bernard M." was concerned, evidence was given of the bringing of a quantity of liquor by that vessel to Lake Erie in 1925, where it was transferred to a boat called the "Killarney," by which it was brought to Belle River, where it was taken ashore by Wilkinson at midnight, and thence removed by trucks. Asked about this incident in his examination for discovery, Cooper was evasive:—

"49. Q. Was any liquor brought into Ontario by that boat? (Mr. Furlong: Don't answer that.)

"50. Q. Did any part of any cargo brought into Ontario by that boat reach Belle River? A. I never seen any liquor come into Belle River.

"51. Q. You don't mean to infer that none ever came in? A. I answer again that I never seen any come into Belle River."

Neither of the plaintiffs was called as a witness at the trial, which was in June, 1929. The case was set down for the November sittings of 1928, and the endorsements of adjournments on the record indicate that it might have been brought to trial by the plaintiffs then or in February of 1929. In January Cooper was in Windsor. The examination for discovery was on the 22nd of that month, and it is not an unfair inference from his answers on that examination that he had no stomach for a cross-examination at the trial. At all events, at the time of the trial in June his counsel stated he was in Europe for his health.

On his examination for discovery Cooper refused to answer a good many questions that were relevant to the issue raised by the affidavit of merits. I extract from the depositions as follows:—

"8. Q. I believe that you were interested in a boat, an ocean vessel known as the 'Bernard M.'? A. Yes, sir.

"9. Q. When did you acquire that? A. I can't swear as to dates.

"10. Q. Were you the sole owner? A. No, sir.

"11. Q. Was it owned by a syndicate? (Mr. Furlong: Don't answer that.)

"12. Q. How long had you been interested in it? (Mr. Furlong: Don't answer.)

"13. Q. Who did you acquire it from? (Mr. Furlong: Don't answer.)

"14. Q. What interest did you have in it? (Mr. Furlong: Don't answer.)

"32. Q. You told me just now it was necessary to have the boat registered in the name of a Canadian subject and you refuse to answer the question whether or not any of the members of this syndicate you speak of were Canadian subjects? (Mr. Furlong: He refuses to answer on advice of counsel.)

"33. Q. What was the object of having the boat registered in Mr. Wilkinson's name? (Mr. Furlong: Don't answer that.)

"37. Q. Where did it run to and from, do you know? (Mr. Furlong: Don't answer.)

"38. Q. Was it registered in any other port? A. It wouldn't have to be registered in any other port.

"39. Q. Was it registered at the port of Montreal? (Mr. Furlong: Don't answer that.)

"40. Q. Was it registered in the city of New York? (Mr. Furlong: Don't answer that.)

"41. Q. What kind of a business did you carry on with it? (Mr. Furlong: Don't answer that.)

"42. Q. You refuse to tell me what ports it ran into? A. On advice of my counsel—yes.

"43. Q. Was it ever registered in the Island of Jamaica? (Mr. Furlong: Don't answer that.)

"46. Q. The boat was carrying on an illegal business? A. No, it wasn't.

"47. Q. Subject to seizure? (Mr. Furlong: Don't answer that.)

"48. Q. Was any liquor brought into Canada by that boat? (Mr. Furlong: Don't answer that.)

"71. Q. In whose name was the boat business carried on? (Mr. Furlong: Don't answer that.)

"72. Q. Was there ever any sales tax paid on the sales made by the boat? (Mr. Furlong: Don't answer.)

"73. Q. You refuse to tell me whether any sales tax was paid upon the transactions entered into by the boat? A. On advice of counsel—yes.

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"74. Q. And you refuse to tell me the name of the firm which carried on the business of which you were a partner? A. On advice of my counsel—he says it is unnecessary to answer."

"141. Q. You refuse to tell me what sort of cargoes the 'Bernard M.' or 'Fred B.' brought into Canada? (Mr. Furlong: Yes, he refuses to answer that question.)

"142. Q. Are you willing to state whether or not any duties were paid on goods entering into Canada? (Mr. Furlong: Don't answer.)

"143. Q. You won't tell me whether or not you paid any duty on imports? (Mr. Furlong: No.)"

In *Blatch v. Archer* (1774), 1 Cowp. 63, Lord Mansfield said (p. 65): "It is certainly a maxim that all evidence is to be weighed according to the proof which was in the power of one side to have produced, and in the power of the other to have contradicted."

Adding Cooper's refusal to answer relevant questions to his failure to appear and give evidence at the trial, the proper inference is that if he had appeared at the trial and had answered the questions which he refused to answer on discovery, his answers would have gone to sustain the charges, or some of the charges, made in Wilkinson's affidavit of merits.

I think I ought to add in this connection that the advice given by counsel to Cooper not to answer questions on discovery, and counsel's appearance in court to support his client's case without the presence of either of his clients, and with the off-hand explanation that Cooper was in Europe, argued great confidence by counsel in the complaisance of the Court.

It is not necessary to the illegality of a transaction that the illegality should stare you in the face. It is not necessary that illegality should be an integral part of the agreement; it is enough if one of the parties contemplated an illegal act or transaction and that the other party was aware of it. This is well illustrated by the remarks of Chief Justice Eyre in *Lightfoot v. Tenant* (1796), 1 Bos. & P. 551, 555, 556:—

"Upon the principles of the common law, the consideration of every valid contract must be meritorious. The sale and delivery of goods, nay the agreement to sell and deliver goods, is *prima facie* a meritorious consideration to support a contract for the price. But the man who sold arsenic to one who he knew intended to poison his wife with it, would not be allowed to maintain an action upon his contract. The consideration of the contract, in itself good, is there tainted with turpitude which destroys the whole merit of it. I put this strong case because the principle of it will be felt and acknowledged without further discussion. Other cases

where the means of transgressing a law are furnished with knowledge that they are intended to be used for that purpose will differ in shade more or less from this strong case; but the body of the colour is the same in all. No man ought to furnish another with the means of transgressing the law, knowing that he intends to make that use of them."

So far as the purposes of the agreement between Cooper and Wilkinson in respect of the "Bernard M." contemplated breaches of the statute-law of Canada or of Ontario, there can of course be no question of the illegality of the agreement. But, so far as the agreement contemplated activities having to do with the smuggling of liquor into the United States in breach of the laws of that country, there have been conflicting judicial views.

In *Walkerville Brewing Co. v. Mayrand* (1928), 63 O.L.R. 5, in which the question was as to the legality of an agreement having to do with the exportation of beer from a dock on the Detroit river near Windsor to the United States, I ventured to express the opinion that the agreement was in breach of international comity and was against public policy and therefore illegal and unenforceable. An appeal was taken from my judgment, and the appeal came on to be argued before the First Divisional Court of the Appellate Division in October, 1928. Judgment was given in March, 1929, 63 O.L.R. 573. Between those dates—in December, 1928—a judgment was given on the same point of law in the Court of Appeal in England in the case of *Foster v. Driscoll* and two other cases, reported in 45 Times L.R. 185 (25th January, 1929), and later fully reported in [1929] 1 K.B. 470.

In the *Foster-Driscoll* cases, four persons had entered into a partnership in England for the purpose of carrying out a scheme for the importation of whisky into the United States. Ultimately the scheme was abandoned, and the litigation which followed was between the partners in reference to alleged breaches of contract and for non-payment of bills of exchange connected with the scheme. The Court of Appeal held, reversing the trial Judge, that, the object to be attained by this agreement being in breach of international comity, the agreement was contrary to public policy and therefore void. Lord Justice Scrutton, dissenting, did not differ from the other members of the Court as to the principle of law which they laid down, but thought that under the agreement in question the whisky might have been sold in Canada or on the high seas, without any breach by the parties of the law of the United States.

In the course of his elaborate reasons, Lord Justice Lawrence said (pp. 500, 501): "It is, in my judgment, plainly established

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by the evidence that by the laws of the United States the importation into that country of alcohol for beverage purposes is prohibited and made a criminal offence, and that the parties with knowledge of these laws embarked upon their adventure with the object of making a very large profit by importing, or by instigating or aiding and abetting others to import, a considerable quantity of whisky into the United States in violation of the laws in force in that country."

. And (p. 510) he continues: "If the real nature of the adventure be as I have described it, I do not gather that it was seriously disputed by counsel that it would be an illegal partnership, and that none of the documents purporting to define the rights and obligations of the partners amongst themselves would be enforceable in any Court of this country. Although there are numerous instances of illegal partnerships to be found in the reports, I have been unable to find any case in which the facts are similar to the facts of the present case. On principle however I am clearly of opinion that a partnership formed for the main purpose of deriving profit from the commission of a criminal offence in a foreign and friendly country is illegal, even although the parties have not succeeded in carrying out their enterprise, and no such criminal offence has in fact been committed; and none the less so because the parties may have contemplated that if they could not successfully arrange to commit the offence themselves they would instigate or aid and abet some other person to commit it. The ground upon which I rest my judgment that such a partnership is illegal is that its recognition by our Courts would furnish a just cause for complaint by the United States Government against our Government (of which the partners are subjects), and would be contrary to our obligation of international comity as now understood and recognised, and therefore would offend against our notions of public morality."

Lord Justice Sankey said (p. 520): "In the present case, in my view of the facts, all the parties concerned were engaged in an adventure which had for its express purpose the violation of the law of the United States." And at p. 521: "Here the adventure was for the express purpose of violating the law of the United States of America. I cannot think that, where parties intend to deliver in (the United States of) America, if possible, and take all steps to enable them to do so, the contract is rendered less obnoxious because they have provided that in a certain event, which by the way has not happened, they will sell the cargo to persons in Canada who may be able to do what they themselves cannot effectuate." And at the same page and p. 522: "To sum up, in my view an

English contract should and will be held invalid on account of illegality if the real object and intention of the parties necessitates them joining in an endeavour to perform in a foreign and friendly country some act which is illegal by the law of such country, notwithstanding the fact that there may be, in a certain event, alternative modes or places of performing which permit the contract to be performed legally."

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And Lord Justice Scrutton, dissenting, said (p. 484): "This is a case of great difficulty if the Court has to ascertain the legal results of the complicated facts. My brothers, however, take the view that the whole adventure is illegal and that the Court should set aside the judgment of Wright, J., make no order in favour of or against any of the parties, and give no one any costs. While I should like to arrive at the same result, I think that on legal principles, as the adventure could be carried out lawfully or unlawfully, and the parties have not agreed how to carry it out, the Courts can deal with the legal results as if it were carried out lawfully."

The judgment of the Appellate Division of this Court in the *Walkerville-Mayrand* case (63 O.L.R. 573), as I read the reasons of the Chief Justice of Ontario, turned, not upon the question of the illegality of the agreement in question, but upon the absence of proof of the law of the United States. The *ratio decidendi* of the judgment is contained in the following paragraph of Sir William Mulock's reasons (p. 576):—

"There being no evidence before the Court that the importation of liquor into the United States of America was unlawful, the finding, based on the supposition that it was unlawful, and that therefore the company was engaged in an unlawful business, cannot be supported."

All the members of the Court concurred in this view of the case, and Sir William Mulock and Mr. Justice Magee, who adopted Sir William's reasons, did not feel called upon to discuss the *Foster-Driscoll* cases, which had been reported a couple of months earlier. But Mr. Justice Hodgins thought (p. 580) that there was "a much broader and wider ground upon which the judgment in question should be set aside"—that is to say, the question of the illegality of the agreement between the Walkerville Brewing Company and Mayrand, assuming that the importation of the beer in question was contrary to the laws of the United States.

At p. 579 of 63 O.L.R., Mr. Justice Hodgins remarked:—

"It may be conceded that the prohibition law of the United States and its conventional standard of intoxicating drink have formed the economic basis for a system of 'bootlegging' and 'hijack-

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ing,' but the consequence of that policy does not, without more, warrant either the assumption that the parties to this case are guilty of an infraction of a foreign law, having no force or validity here, nor a finding that their business is not under our constitution and statutes a legitimate one." And (at p. 581) he continued: "In conclusion I may say that I am unable to agree with the learned trial Judge upon the major proposition that the question involved in this case is not one which depends upon Dominion or Ontario statute-law. If there is any common knowledge in this country of which the Court should take notice and which indeed it should apprehend and apply continuously, it is the policy both of the Dominion and of the Province, as set out in their statute-law and regulations having the force of law. While I agree that the question of public policy may arise from different considerations than those founded upon explicit enactment, I do not agree that public policy can be based upon the views of a judicial officer founded upon his individual conception of 'justice, morality, and convenience,' nor unless the same comes within some established principle of law or follows directly from principles recognised in the courts and by the State as part of its public law."

Mr. Justice Grant agreed with the reasons of Mr. Justice Hodgins.

Though Mr. Justice Hodgins did not mention the *Foster-Driscoll* cases, his views are obviously the direct antitheses of those expressed by Lord Justices Lawrence and Sankey. The judgment of the Court of Appeal in England was not of course binding upon the Appellate Division of this Court, as, I suppose, it is not binding upon me.

Under these circumstances I find myself in the embarrassing position of being called upon to choose between the views of Lord Justices Lawrence and Sankey, two eminent Judges of the Court of Appeal in England, on the one side, and those of Justices Hodgins and Grant, two equally eminent Judges of our own Court, on the other. With great deference, I have no hesitation, if I am free to do so, in preferring the arguments of the Judges of the English Court—perhaps because they are confirmatory of the views which I had ventured to express in the *Walkerville-Mayrand* case last September.

I may just add that in the case now before the Court there was formal proof of the effect of the 18th Amendment of the Constitution of the United States and of the Act of Congress which followed.

The assignments of the mortgages by Cooper to Harwood were, I have no doubt, made in the hope and expectation that Cooper would be able to recover judgment against Wilkinson without his

appearing personally in the case. Harwood was merely Cooper's agent for the collection of the moneys secured by the mortgages.

There is another aspect of the case upon which I would dismiss the action. By Rule 331, a plaintiff who refuses to answer proper questions put to him on his examination for discovery is liable to have his action dismissed. No explanation was given by counsel for the plaintiff Cooper, either before the special examiner or at the trial, of his refusal to answer questions on discovery. It is not even suggested that the questions were not relevant to the defence raised in the action. It was a clear case of contempt of court, carried on down to the close of the evidence and argument, without explanation and without apology, even after the reading of the questions with their impertinent answers at the trial. So that in effect the contempt was just as great as it would have been if Cooper had been a witness at the trial and if he had flouted the Court in the witness-box as he did before the special examiner. Whether the action is for \$17,500 or \$17.50, a plaintiff who refuses to answer relevant questions, whether on the advice of counsel or not, has no just ground of complaint if his action is dismissed: *Republic of Liberia v. Roye* (1876), 1 App. Cas. 139.

The action is dismissed, but, because Wilkinson was Cooper's willing Man Friday in his rum-running business, he will be left to pay his own costs.

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Agency—Solicitor Acting for Mortgagee—Misappropriation of Moneys Intended to be Used for Paying off Earlier Mortgage—Whether Solicitor Agent for Mortgagors—Evidence—Onus—Estoppel.

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A solicitor obtained from the plaintiff, his client, a cheque for \$1,100, representing that he would invest it upon the security of a mortgage upon land which had been mortgaged to his sister, whose mortgage would be paid off by the \$1,100. In the receipt given to the plaintiff by the solicitor it was stated that the cheque was given to him "re mortgage 10 Rideau-street," which was a brief description of land upon which the defendants had made a mortgage to the solicitor's father's executors. The solicitor notified the defendants that the executors desired payment of this mortgage and that he had a client who would advance the money necessary to pay it off. A mortgage by the defendants to the plaintiff upon this land was thereupon prepared by the solicitor and executed by the defendants in March, 1923. They made payments from time to time upon the mortgage by cheque to the solicitor, who paid these over to the plaintiff, at least in part. The solicitor never paid off the mortgage held by the executors, and consequently did not obtain a

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discharge of it. The \$1,100 was misappropriated by the solicitor, who absconded in 1926. It was intended that the mortgage-moneys should be paid to the executors, and not to the mortgagors, and this the plaintiff understood. This action was brought to enforce the mortgage, and the plaintiff in her evidence at the trial stated that the solicitor shewed her the mortgage in March, 1923:—

Held, that the facts that the mortgagors delivered the mortgage to the solicitor and that he shewed it to the plaintiff did not amount to a representation that the moneys advanced by the plaintiff had been paid to the holders of the first mortgage and that it had been discharged, and it could not be said that the mortgagors were estopped from disputing the fact that the moneys had been advanced to them.

Gordon v. James (1885), 30 Ch. D. 249, distinguished.

Held, also, that the solicitor received and held the moneys as the agent of the plaintiff and was not acting as agent for the defendants in the transaction.

Orme v. Grant (1924), 26 O.W.N. 93, referred to.

Where a solicitor receives money from a mortgagee, the onus is upon the mortgagee to shew that there was a change in the capacity in which the solicitor received and held the money.

As no money was ever advanced by the plaintiff upon the mortgage made to the defendants, the action failed.

ACTION upon the covenant for payment contained in a mortgage and for foreclosure or sale.

The action was tried before WRIGHT, J., without a jury, at a Toronto sittings.

D. H. Porter, for the plaintiff.

F. G. McBrien, for the defendants.

September 30. WRIGHT, J.:—This is an action brought by the plaintiff upon a covenant contained in a mortgage dated the 1st March, 1923, purporting to be from the defendants Elizabeth Jane Crossland and John Crossland to the plaintiff, and for foreclosure, or sale of the premises included therein. The defendant Albert John Crossland was added as a defendant at my suggestion when the case first came up for trial, under circumstances hereinafter detailed.

The defendant Elizabeth Jane Crossland was the owner of the easterly 35 feet of lot 15, Rideau-avenue, in the city of Toronto. In 1912 she mortgaged these lands to the executors of one Cooke to secure \$1,100. The mortgage was negotiated through J. H. Cooke, a solicitor practising in the city of Toronto, a son of the testator whose executors held the mortgage.

The defendant John Crossland testified that in 1923 he received a telephone message from the solicitor J. H. Cooke, who stated that the executors desired payment of the mortgage and that he had a client who would advance the moneys necessary to

pay off the Cooke estate mortgage upon being given a mortgage bearing seven per cent. interest. This was agreed to, and the mortgage was prepared by the solicitor and brought to the home of the mortgagors, where it was signed, J. H. Cooke being the witness.

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There is a recital in the mortgage to the following effect: "Whereas this mortgage is to replace existing mortgage of the same amount;" but whether this was there when executed by the mortgagors or not does not appear; so I shall assume that it was.

The plaintiff was a client of J. H. Cooke, and on the 4th January, 1923, he had represented to her that he had an investment for some funds and obtained from her a cheque for \$1,100, giving a receipt therefor. In the receipt it is stated to be "*re* mortgage 10 Rideau-street, Toronto." It will be noted here that the cheque was given almost two months before the date of the mortgage.

As already stated, Cooke had acted as solicitor for the plaintiff in other transactions, and in her evidence the plaintiff stated that when Cooke obtained the cheque he represented that it was to pay off a mortgage held by his sister on the same property.

The mortgagors from time to time made payments on account of the mortgage by cheque to Cooke, and it would appear that Cooke paid these over to the plaintiff, at least in part. The solicitor did not pay off the mortgage held by the Cooke estate, and consequently did not obtain a discharge of the same, so that the same is still outstanding.

Some time in 1926 Cooke appears to have absconded. The defendant Albert John Crossland, a relative of the mortgagors, took an assignment of the mortgage from the Cooke estate, and when the case first came up for hearing, as the plaintiff's counsel stated that he would contend that the Cooke estate mortgage had been paid off and that the mortgage held by his client was a first mortgage, I adjourned the further hearing to enable Albert John Crossland, the assignee of the mortgage held by the Cooke estate, to be made a party, so that all the issues might be determined between the parties. Albert John Crossland was added as a party and the pleadings amended accordingly, but when the action came up for trial the plaintiff's counsel abandoned all claim against the defendant Albert John Crossland; so that the only issue to be dealt with is, whether or not the mortgage held by the plaintiff constitutes a valid mortgage upon which the defendants, the mortgagors, are liable.

The \$1,100 advanced by the plaintiff appears to have been mis-

Wright, J. appropriated by the solicitor. Upon these facts I am called upon to decide as to the validity or otherwise of the mortgage.
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MURRAY Counsel for the plaintiff rests his argument upon two decisions in the English Courts, namely, *Gordon v. James* (1885), 30 Ch. D. 249, and *London Freehold and Leasehold Property Co. v. Baron Suffield*, [1897] 2 Ch. 608, where the decision in the former case was approved and followed.

CROSSLAND. In my view, the facts in the case are clearly distinguishable from those in the case of *Gordon v. James*. In that case the decision was based upon the principle that where one of two innocent parties must suffer from the wrongdoing of a third party that one who put it in the power of the wrongdoer to commit the wrong must bear the loss.

In this case it was never intended that the mortgage-moneys should be paid to the mortgagors, but it was intended that they should be paid to the executors of Cooke in order to procure a good title in the plaintiff, as first mortgagee, and this the plaintiff understood.

I should mention that the plaintiff in her evidence stated that the solicitor Cooke shewed her the mortgage some time in March, 1923, and her counsel now relies upon this fact as bringing the case within the decision in *Gordon v. James*.

Had it been intended between the parties that the money should have been paid to the mortgagors, there might be some force in this argument; but, as it was the intention of all parties that the money should be paid to the executors of Cooke in order to pay off the mortgage held by them, the circumstances are clearly different and the result must differ accordingly. The fact that the mortgagors delivered to the solicitor the mortgage and that the mortgage was shewn to the plaintiff did not in any way amount to a representation that the moneys advanced by the plaintiff had been paid to the holders of the first mortgage and that the same had been discharged, so that it cannot in any view be said that the mortgagors are estopped from disputing the fact that the moneys had been advanced to them or on their behalf.

There is nothing inconsistent in the fact that they executed the mortgage and gave it to the solicitor with the position which they now take, namely, that the solicitor did not receive the moneys as their agent. At p. 257 of 30 Ch.D., Lord Justice Cotton bases his judgment on the ground that the position taken by the mortgagors was inconsistent with the representation made by their agent and which they by their own act enabled him to make.

In the present case I do not think it can be said that the solicitor Cooke was the agent for the mortgagors. In requiring them

to pay up the mortgage he was professedly acting as solicitor for the first mortgagees, and though it was to the advantage of the mortgagors and in their interest that the moneys should be paid to the first mortgagee, yet it could not be said that Cooke was acting as their agent in that behalf. It is clear that he received the moneys from the plaintiff as her solicitor and agent, for the express purpose of paying the same over to the first mortgagees. He, therefore, received and held this money as agent for the plaintiff, and his character as such agent was not changed.

The facts in this case are in many respects similar to those set out in *Orme v. Grant* (1924), reported in 26 O.W.N. 93, and the decision of Mr. Justice Middleton in that case is of material assistance in the decision of this case.

The authorities appear to be to the effect that where a solicitor receives money from a mortgagee as solicitor the onus is upon the mortgagee to shew that there was a change in the capacity in which the solicitor obtained and held the money. In this case there is no evidence to shew such a change, nor can any inference be drawn to that effect.

In the result I hold that no money was ever advanced by the mortgagee upon the mortgage to the defendants Elizabeth Jane Crossland and John Crossland, so that the plaintiff's action must fail.

It is exceedingly regrettable that, through the fraud and dishonesty of a solicitor who was trusted by the plaintiff with the conduct of her business, she should suffer the loss; but, as he was acting on her behalf, she must bear the loss rather than the mortgagors, who did not in any sense employ the solicitor to act on their behalf or as their agent.

The action will be dismissed with costs.

The plaintiff appealed from the judgment of WRIGHT, J.

November 15. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A.

Porter, for the appellant.

McBrien, for the defendants, respondents.

THE COURT gave judgment at the conclusion of the hearing dismissing the appeal with costs, for the reasons stated by WRIGHT, J.

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OSTRANDER V. MICHIGAN CENTRAL RAILROAD CO. AND PERE MARQUETTE RAILWAY CO.

Railway—Breach of Statutory Duty—Destruction of Vehicle at Level Highway Crossing—Application of secs. 264, 265, and 266 of Railway Act to Level Crossing—Findings of Jury—Evidence—Defective Crossing—Nuisance—Discretion of Court as to Granting New Trial—Dismissal of Action—Costs.

The plaintiffs' tractor and threshing outfit, moving along a highway, became stalled upon a level crossing of the defendants' railways and were struck by the engine of a train and destroyed. At the trial of an action for damages for negligence and breach of statutory duty in the construction of the crossing, the jury made certain findings in favour of the plaintiffs, based upon alleged breaches of the duty imposed upon the defendants by secs. 264, 265, and 266 of the Railway Act, R.S.C. 1927, ch. 170, and judgment for the plaintiffs was entered thereon by the trial Judge:—

Held, upon appeal, that these sections imposed no liability upon the defendants in respect of a level crossing; and the findings of the jury, being based upon an erroneous assumption that they were applicable, should not be regarded.

Held, also, upon a review of the evidence given at the trial, that there was no ground for a finding that the construction of the crossing was defective and constituted a nuisance.

The rule that the Court can set aside the findings of fact by a jury, only if they are such as reasonable and honest men could not make, has no application in a case where the findings are wholly nugatory; and in the present case the Court, in its discretion, ordered that the action should be dismissed without costs, instead of granting a new trial with leave to amend.

An appeal by the defendants from the judgment of LOGIE, J., at the trial, upon the findings of a jury, awarding the plaintiffs \$1,800 damages, in an action to recover damages for the destruction of the plaintiffs' tractor and threshing outfit, which became stalled upon a level highway crossing of the defendants' railways, and were struck by the engine of a train. The action as launched was for breach of statutory duty and negligence in construction and operation of the engine and train of the defendant the Pere Marquette Railway Company. The findings of the jury are set out in the judgment of MASTEN, J.A., *infra*.

May 14. The appeal was heard by LATCHFORD, C.J., MASTEN, ORDE, and FISHER, J.J.A.

B. H. Furlong, for the appellants. Section 265 of the Railway Act, R.S.C. 1927, ch. 170, imposes no duty on a railway company. It relieves from liability from what might otherwise be deemed an obstruction. Nothing more. Section 264 has no application to a

crossing at rail level. It deals with a structure by which a railway is carried over or under a highway or a highway carried over or under a railway. It imposes no liability in respect of a highway carried across a railway at rail level. Section 266 is one instance of Parliament imposing duties with respect to a highway which is carried over or under any railway or across it at rail level. If "over or under" includes "crosses at rail level" in sec. 265, Parliament would not in sec. 266 use words which would in that view be mere surplusage: Halsbury's Laws of England, vol. 27, p. 135, para. 242. There is no statutory duty to maintain a highway where the railway crosses it at rail level. If Parliament had intended to impose such a duty, clear words would have been used to express that intention. Upon the answers of the jury, there was only one proper judgment to be entered, namely, to dismiss the action, because the jury have not found negligence in respect to which there was evidence. No substantial injustice will be done by giving effect to that finding and dismissing the action, and there should not be a new trial. The evidence on behalf of the plaintiffs does not support the finding of the jury; but, even if it did, if the Court is satisfied that twelve reasonable men could not reasonably make the finding which they did, their finding should be reversed: Judicature Act, sec. 27.

C. B. McClurg, for the plaintiffs, respondents. Reading secs. 264 and 265 together, it is apparent that sec. 264 applies to a crossing on a highway carried across a railway at rail level, as it would be impossible for a railway company to prevent the rail rising more than one inch above the level of the highway unless it did something to the space on the highway between the rails, such as filling it in with earth or pavement or planks. The rails must be, in a literal sense, either over the highway or the greater portion of them under the surface of the highway. Although as a general rule a word is to be considered as used throughout a statute in the same sense, it may happen however that the same word is used in different senses in the same section, and *à fortiori* in different sections of the same statute: Halsbury's Laws of England, vol. 27, p. 135, para. 241; MacMurchy & Spence on the Railway Law of Canada, 3rd ed., p. 396; *Stevens v. Canadian Pacific Railway Co.* (1913), 4 O.W.N. 697, 15 Can. Ry. Cas. 28; *Raspberry v. Canadian National Railway Co.* (1928), 62 O.L.R. 406. There was evidence that the top of the rail rose more than one inch above the level of the highway at the point where the traction engine of the threshing outfit skidded along the rail, as found by the jury in answer to the second question. As to sec. 27 of the Judicature Act, there was ample evidence to sustain the findings of the jury, and in these

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circumstances the Court should not set them aside and enter a judgment contrary thereto: *Reynolds v. Canadian Pacific Railway Co.*, [1927] S.C.R. 505; *Tinsley v. Toronto Railway Co.* (1908), 17 O.L.R. 74; *Toronto Railway Co. v. King*, [1908] A.C. 260.

[The above is a summary of the arguments addressed to the Court at the hearing of the appeal and of written arguments subsequently put in by leave of the Court.]

October 25. LATCHFORD, C.J.:—I cannot but think that the questions submitted to the jury and their answers were based on a total misapprehension of the purpose and effect of secs. 264, 265, and 266 of the Railway Act. Every allegation of negligence in the statement of claim, even that in para. (g) of the amended statement of claim, is based on a breach of one or more of the sections mentioned.

It may be that when, in answer to the first question submitted, the jury found that the top of the northerly rail "did rise above the level of the highway to the extent of more than one inch," they meant that the rail was above the level of the plank inside it. The subsequent findings of the jury that the construction was defective and constituted a nuisance are not based on any issue raised by the pleadings, but are founded on the assumption, wholly unwarranted, that sec. 265 imposed on the defendants a liability which they had not discharged. Every other ground of negligence, each alleged to be an infraction of the statute, was expressly negatived by the jury. It was not pleaded that the defendants were liable at common law, yet it is only on the basis that the crossing was so constructed as to constitute a nuisance that any liability can be held to attach to the defendants.

It is patent that the appeal should be allowed, at least to the extent of granting a new trial, but, as there have been two trials already, I think the action should be wholly dismissed.

I am not unmindful that a maximum of reverence is, or rather was, ordinarily due to findings of fact made by a jury, but now-a-days in this Province, where many members of every jury are owners or drivers of automobiles, it is notorious that in actions against railway companies for damages occasioned on level crossings credit is frequently given to evidence that to disinterested persons appears absolutely incredible. It is now equally notorious that in the many trials of motorists for what upon the evidence is clearly manslaughter, juries will not find the accused guilty of that crime, but only, if at all, of the several minor offences now commonly, *ex majore cautelâ*, charged in the same indictment. On binding authority I have in most cases to subject my opinion

to that of a jury. However, in view of the findings in the present case and the confusion expressed in it as to the law, it may not be amiss to review as briefly as possible the evidence on which liability has been imposed on the defendants.

Many facts are undisputed. Where the accident happened, a highway known as the Edgeware-road crosses the defendants' tracks at an angle, that on the north side being of about 25 degrees, according to the plan filed. The railway is double-tracked, the north rail of the east-bound line being 13 feet from the south rail of the west-bound line. The tracks form the main lines of a subsidiary of the great New York Central Railway between Niagara Falls and Windsor, and are also used by the Pere Marquette Railway. To sustain rapid passenger and heavy freight trains the permanent way is necessarily of a very high order as regards both construction and maintenance as well as supervision. Apart from ties, the materials in use are represented by exhibits. The rails are 6 inches in depth and weigh 120 lbs. to the yard. They rest on heavy tie-plates, and are spiked to oak ties, 8 to 10 inches wide, set 20 to 22 inches from centre to centre.

At Edgeware-road, the crossing of the highway was made even with the top of the rails. This was effected by placing along each tie from rail to rail a heavy hemlock block 8 inches in width by 3 inches in thickness and spiking it firmly to the tie, thus forming a rigid structure extending to within 3 inches of the rail level. On ties centred 20 inches apart, the interval between the blocks was one foot, and, where the centring was 22 inches, 14 inches. Transversely across the blocks, and parallel to the rails, were laid 3-inch hemlock planks, usually connected directly with the ties by 10-inch chisel pointed spikes. Where the ties were but 8 inches wide, the spikes had to be driven through the blocks. It is suggested that when this was done the blocks might be split. That result, however, would not necessarily follow, as the points could be set and driven diagonally to the grain of both planking and blocking.

On the outer side of each rail were placed planks similarly supported, I infer. What was left of the 13-foot space between the tracks, like the approaches on both sides, was brought up to the grade level of the rails and planking with crushed stone. According to the unquestioned evidence of a number of maintenance-of-way employees of the railways, the crossing had been put in perfect condition about two weeks before the accident. Planks and blocks that may have been in stock for months, but that were otherwise new, had been substituted for those that had deteriorated. A more solidly and stably constructed crossing cannot be imagined.

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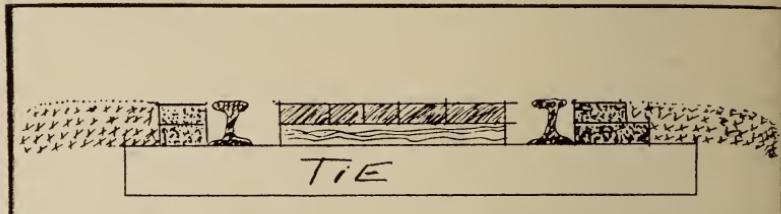
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It was, of course, necessary to leave between the rails and the inner planks a clear space for the passage of the flanges of the train wheels. This space had a width of approximately two inches.

A rough cross-section sketch may render the construction plainer than does the description.



The crossing was approached on the night of the accident by the plaintiffs' threshing "outfit," consisting of a steam tractor engine in the lead, driven by Frank Ostrander, and hauling a separator, followed by a tank drawn by horses. Huffman, one of the owners, had been walking ahead with a lantern to guide Ostrander along the road. They had stopped to allow an east-bound train to pass. Huffman then went to the north tracks, and seeing, he says, no west-bound train approaching, called on Ostrander to proceed, while he himself walked north ahead of the engine. Ostrander came on, Huffman continuing in the lead. The east-bound track was crossed in safety by the front wheels of the tractor, as was also the southerly rail and part of the planking. Then, says Ostrander, "we came to the west-bound track and skidded on the rail. (This was on and inside the northerly rail.)

"Q. When you found the engine skidding what did you do?

A. I threw the friction off the engine and asked Mr. Huffman what was the matter.

"Q. Did he tell you? A. He did.

"Q. As a result . . . what did you do? A. I got off and looked at it.

"Q. What did you find? A. I found it was skidding, that the plank had settled and allowed the wheel to skid on the rail.

"His Lordship: You found what? A. The plank had settled.

"Q. And what? A. And allowed the engine to skid.

"Mr. McClurg: How far would you say that plank had settled? A. In my judgment about three inches."

Asked on cross-examination to describe a front wheel of the traction engine, he said it had a 6-inch face with the rim sunk, "what we call 'centre sunk,' to hold the wheel from skidding." What this means was subsequently cleared up by Huffman. Ostrander did not mention that the wheel had a flange.

Ostrander's attention was then called to his examination for discovery:—

"202. Q. You told me you stopped the engine. A. I did when it started to skid."

"203. Q. If you had kept on going instead of stopping your engine could you have got over safely? A. Yes.

"204. Q. You did not keep on going, and you stopped to look after your engine, you stopped it? A. Yes.

"205. Q. If you had kept on going could you have pulled it over all right? A. Yes."

"Do you remember making those answers to those questions, and were they true? A. I do, and they were true. If we had had no obstruction we would have passed on over safely."

Huffman's evidence is virtually identical with Ostrander's, that the plank next the rail settled "when the wheel" (which was the right wheel) "struck the plank it skidded."

"Mr. McClurg: Could you see it? Did you see it? A. Yes, I seen it.

"His Lordship: Saw what? A. Saw the plank settle, and I seen it skid."

It is to be observed that at that moment Huffman was walking northward in front of the engine, guiding Ostrander in the same direction. If he was not walking backward or with his head turned—and neither is suggested—it was physically impossible for him to have seen the settling and skidding which he swore to.

Subsequently Ostrander, he said, tried twice to cross the rail.

"Q. And then what happened? A. It still skidded."

In other words, the wheel-flange still ran along in the slot or groove inside the northerly rail.

Ostrander's first statement as to his stopping on the intersection will bear repetition here: "We came to the west-bound (track) and skidded on the rail." He had, before stopping, observed the approach of the train. As he was in the driver's seat on the tractor, he could, in the darkness prevailing, no more see the plank beneath the wheel than could Huffman, who was walking ahead. He does not pretend that he did see the plank until after he had called on Huffman to ascertain the cause and Huffman had come back to the scene. Then, and not until then, he found, he says, that the plank had settled. Huffman, who, according to Ostrander, did not know of the skidding until after it had happened—who according to his own evidence did not know of the skidding until it was happening—times the settling as something which he saw prior to the skidding, which on his own statement he saw only after it had begun.

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The skidding evidently was what happened first. The settling is plainly invoked to account for the skidding, though there was present an obvious cause—not mentioned by Ostrander, but appearing faintly in the small photographs and clearly in Huffman's evidence—the flange on the right front wheel of the traction engine engaging in the groove between the planking and the rail. Mr. Furlong, in summing up Huffman's testimony on the point, asked:—

"Then we have it that there is a flange on both the front wheel's?"

A. Yes.

"Q. And we have it also, I think, that the flange and outside rim skidded on the rail? A. Yes."

The crossing was made at an acute angle—probably at a more acute angle than that made with the railway by Edgeware-road, as, while on the east-bound track, Ostrander had seen the train coming and would naturally be inclined to turn away from it. He appreciated the cause of the skidding when he stated that, had he been able to cross "straight," or at right angles to the rails, he would not have skidded. In that event, the pressure of his front wheels on the plank next the north rail would have been at least as great as on a diagonal approach, but the flange of one of his wheels would not have dropped, as it undoubtedly did, into the open space between the planks and the rail. The flange was in a place made for a flange to run in, and being unable to leave it and surmount the rail, the wheel "skidded" as Ostrander said it did. In the circumstances this would have happened, as I think it did happen, with the top of the adjacent plank on the same level as the rail, but would not have formed a good ground for an action. The subsidence or settling of the plank—something beyond what naturally caused the skidding—was therefore made the basis for the contention that the crossing was so constructed as to be a nuisance causing the plaintiffs' damage.

As I have indicated, the method of construction was very good and the materials excellent. Frank Ostrander and Huffman made not the slightest suggestion that the plank was defective, and they say they saw it before the impact of the train.

John Ostrander, one of the plaintiffs, who visited the crossing on the morning after the accident, was called to testify in support of the theory that the planks were decayed. His evidence however reacted disastrously. After he had said that he found the planks torn up and badly broken, he was asked by Mr. McClurg: "What was their condition?" The witness answered: "I found they were—looked rotten, dozy." Then, his counsel continued, "Why do you say it looked rotten?" No doubt he was sorry he had put the

question when the witness with the best of intentions replied, "Well, they didn't look bright like new wood."

William Seers, called for the same purpose, said: "I found planks that were torn up and decayed. They had spots in them that long."

"His Lordship: Two feet? A. Well, *we will say* two feet, and they were decayed half-way through." Mr. Furlong did not think it necessary to cross-examine him.

William Summons was called in reply to shew that it was possible for a crossing, built as was the crossing of the Edgeware-road, to sag. Objection was taken but disallowed. He knew nothing about the crossing, but suggested what might happen if a cross-piece moved and in other contingencies that were not shewn to have happened. Nothing contained in his evidence is of any importance, and, even if properly admissible, it does not support the plaintiffs' contention at the trial that the crossing constituted a nuisance.

The appeal should, in my opinion, be allowed and the action dismissed. I would make no order as to costs.

Since the foregoing was written, I have had the privilege of reading the judgment of my brother Masten, in which the law applicable is carefully reviewed; and I concur generally in his opinions.

MASTEN, J.A.:—Appeal by the defendants from the judgment dated the 15th March, 1929, entered by Mr. Justice Logie after a trial with a jury, whereby it was ordered that the plaintiffs recover from the defendants the sum of \$1,800 and costs.

The action is for alleged breach of statutory duty which, the plaintiffs claim, occasioned the destruction of their threshing engine and outfit.

On the 2nd day of September, 1927, the plaintiffs' engine and outfit was being driven in a westerly direction on a highway known as the Edgeware-road at a point where it intersects the right of way and tracks of the defendant railway company at a level crossing. The plaintiffs' tractor stalled on the railway track and was struck and destroyed by an engine and train of the defendant the Pere Marquette Railway Company.

The particulars of the grounds of action set forth in the statement of claim are as follows:—

"(a) The train causing the aforesaid damages was, in the circumstances, travelling at an excessive and dangerous rate of speed.

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"(b) The inclination of ascent of the approach from the east by which the said highway is carried across the said railway, at the point where the accident occurred, is greater than one foot of rise for every twenty feet of the horizontal length of the said approach.

"(c) The top of the rails of the said railway were, at the time of the said accident, more than one inch above the level of the highway, contrary to statutory requirements.

"(d) The said train, at the time of the accident, was not equipped with efficient brakes, and thereby such train was beyond the control of the locomotive engineer, who was unable to bring the said train to a stop within a reasonably distant space in case of an emergency.

"(e) Notwithstanding due and timely warning and signals by the plaintiffs that the said threshing engine and outfit were stalled on the said crossing, the defendants, their servants and employees, negligently and wilfully failed to heed the said warning and signals, and crashed into the said plaintiffs' threshing engine and outfit.

"(f) The locomotive engine of the said train was not, at the time of the accident, equipped with an adequate head-light of sufficient strength to enable the engineer operating the said locomotive to see the threshing engine and outfit of the plaintiffs stalled on the railway track at the distance required by order in that respect of the Board of Railway Commissioners.

"(g) The crossing by which the said highway is carried across the railway was negligently constructed in that the material used in such construction was unfit and unsuitable for the purpose so employed, and the said crossing was so defectively built that, when the planks thereof were subjected to the weight of the said threshing engine, such planks sank below the level of the rails *to a greater extent than permitted by the statute*, and thereby created an unlawful obstruction on the highway which caused or contributed to the plaintiffs' damage."

The learned trial Judge first submitted to the jury certain questions relating to the alleged breach of statutory duty, and after these were answered submitted a further set of questions as to the alleged negligence of the defendant the Pere Marquette Railway Company in the operation of its railway. The original questions and answers, and the subsequent questions, so far as answered by the jury, are set out below. Certain other questions with respect to contributory negligence of the plaintiffs and the apportionment of damages were not answered.

Questions and answers of the jury.

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His Lordship: You answer the first question: Was the structure by which the highway was carried over the railway at the crossing in question so constructed and maintained as to afford safe and adequate facilities for all traffic passing over such structure?

A. No.

"If not, did the top of the rail rise above the level of the highway to the extent of more than one inch? A. Yes.

"Did such rise create an obstruction upon the highway amounting to a nuisance? A. Yes.

"If you answer question number 2, "Yes," was this obstruction the cause of the accident? A. Yes.

"His Lordship: You answer the question, Was the defendant guilty of any negligence other than you have already found, which caused the accident? A. No.

"Were the plaintiffs guilty of any fault or negligence which contributed to the accident? A. No.

"Damages? A. \$1,800."

Both the statement of claim and the questions are plainly framed on the hypothesis that secs. 264 and 265 of the Railway Act apply to the circumstances shewn in evidence and impose statutory obligations on the defendant railway companies, and no other ground raised on the record is found against the defendants. In fact all other grounds are negatived.

I venture to suggest that question number 2 is not happily expressed. The rail did not "rise," but there is evidence that the planking sank; and, reading the Judge's charge as a whole, I feel constrained to the view that the trial Judge, bearing in mind the evidence, considered that if the answer to question 1 determined that there was a breach of duty, then such breach must have arisen because the top of the rail became (from the sinking of the adjacent plank) more than one inch higher than the adjacent plank and an illegal obstruction. That this was the idea in the mind of the trial Judge is evident from his remark at p. 169 of the record, where he says:—

"You have already found that the accident was due to the crossing, the crossing being improper and rotten or as you have found it."

Coupling this remark with what the trial Judge said in his original charge at pp. 151 and 152, I am driven to the conclusion that the jury must have understood question number 2 in the same way as did the Judge, viz., as specifying in more detail the particular breach of duty which had already been found in general

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terms in answer to question number 1, and as meaning that the planking adjacent to the rail sank more than one inch below the top of the rail when the engine reached it, and thus that questions 1 and 2 are not distinct and independent but are concatenated. The charge is clear and explicit in bringing that question to the attention of the jury, and is as follows:—

"Seers says he is a farmer; he is not interested of course in this matter at all—he saw it on Sunday morning, the accident being on the Friday night, and he found planks that were torn, that were decayed, they were, I suppose, 2 feet long, and decayed half-way through. That is his evidence. Now those are the planks Ostrander is talking about when he says he saw them sink; and, if that is so, there may be some evidence from which you may think that the whole roadbed did not have to sink in order to let the machine down, but that those planks were dozy and rotten and they let the machine down, and the machine did skid on the rail, as Ostrander said. But, as against that, you have the evidence of Orman Darragh, Edward Durdle, Shepley Ashford, James Blumenstien, Oliver Dawson, and, lastly, Clarence Knott."

And he then proceeds to remind the jury of the evidence given by these witnesses for the defendants. So that the jury had the real question before their minds when answering questions 1, 2, 3, and 4.

The evidence of Frank Ostrander at p. 3, lines 16-22, and at p. 7, line 31, of Huffman at p. 28, lines 6-21, coupled with the evidence of John Ostrander and William Seers, if believed, establishes that owing to its defective condition the plank next to the north rail sank so that the top of the rail was 2 or 3 inches above the adjacent plank.

Though I am utterly unable to concur in the view adopted by the jury, there is thus some evidence on which they may perhaps have been entitled to rely in support of their finding; and but for an infirmity presently to be considered it may be that their findings of fact, so far as they are relevant to the issues raised on the record, might be unimpeachable in this Court.

But, whether that is so or not, I think that on a ground now about to be stated this appeal must be allowed and the action dismissed.

Written arguments have been, by leave of this Court, filed on behalf of both parties, and counsel for the railway companies in his memorandum-brief raised for the first time (so far as I can discover) the question that neither sec. 264 nor sec. 265 imposes an obligation on railway companies in respect to the maintaining of level crossings.

That question ought, in my opinion, to have been raised at an earlier stage, and I cannot but think that confusion and difficulty in the proper disposition of the action would have been obviated if this had been done.

Being a question of law limited to the construction of the Railway Act, I think we are bound to consider it even though raised at so late a stage, but the failure to raise the question earlier has a bearing on the question of costs.

The contention of the appellants in respect to secs. 264 and 265 of the Railway Act, R.S.C. 1927, ch. 170, is stated as follows:—

“Section 265 imposes no duty on a railway company. It relieves from liability from what might otherwise be deemed an obstruction, nothing more.” Masten, J.A.

“Section 264 has no application to a crossing at rail level. It deals with a structure by which a railway is carried *over or under* a highway or a highway carried *over or under* a railway. It imposes no liability in respect of a highway *carried across a railway at rail level*.

“Section 266 is one instance of Parliament imposing duties with respect to a highway which is carried *over or under* any railway or *across it at rail level*.

“If *over or under* includes *across at rail level* in sec. 265, Parliament would not, in sec. 266, use words which would in that view be mere surplusage.

“‘Where in the same statute, and in relation to the same subject-matter, different words are used, *prima facie* the alteration has been made intentionally?’ Halsbury’s Laws of England, vol. 27, p. 135, para. 242.”

Supplementing these specific contentions, it is contended broadly on behalf of the appellants that there is no *statutory duty* to maintain a highway where the railway crosses it at rail level; and no basis for that contention, apart from secs. 264 and 265, is indicated by the respondents.

I proceed to state why, in my opinion, secs. 264 and 265 do not, in the circumstances of this case, impose a statutory liability on the defendants.

These sections are as follows:—

“264. Every structure by which any railway is carried over or under any highway or by which any highway is carried over or under any railway, shall be so constructed, and, at all times, be so maintained, as to afford safe and adequate facilities for all traffic passing over, under or through such structure.

“265. Whenever the railway crosses any highway at rail level, whether the level of the highway remains undisturbed or is raised

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or lowered to conform to the grade of the railway, the top of the rail may, when the works are completed, unless otherwise directed by the Board, rise above or sink below the level of the highway to the extent of one inch without being deemed an obstruction."

I think it is the evident purpose of sec. 264 to cast upon the railway company the obligation of protecting, at its own expense, the public who have occasion to pass over or under a railway at its intersection with a highway, and I see no reason why Parliament should not have made this provision applicable to a level crossing as well as to an overhead bridge or to a subway.

Nevertheless the Court is not at liberty to construe sec. 264 on the basis of what it might suppose the general policy of Parliament to have been, but must interpret the very language used by the Legislature and the words of the statute in the light of contiguous sections relating to the same subject-matter.

It is a sound rule of construction to give the same meaning to the same words occurring in different parts of an Act of Parliament: *Courtauld v. Legh* (1869), L.R. 4 Ex. 126, 130.

In sec. 265 and also in sec. 266,* the statute, in dealing with the subject of highway crossings, refers specifically to crossing "at rail level," and the failure of the Legislature to include these words in sec. 264 seems to me to manifest an intention that the "structure" mentioned in that section refers only to an overhead bridge or to a subway passing "over or under" the highway, as the case may be, and does not include a level crossing. I think, therefore, that sec. 264 does not apply to the crossing in question or impose a statutory obligation on the railway company.

Section 265 is permissive and in ease of the railway company. It imposes no obligation, but, on the contrary, it obviates liability for what might otherwise be found by a jury to be an obstruction or defect.

Further, the words of the section are:—

"The top of the rail may, *when the works are completed*, rise above or sink below the level of the highway to the extent of one inch without being deemed an obstruction."

* 266. The inclination of the ascent or descent, as the case may be, of any approach by which any highway is carried over or under any railway, or across it at rail level, shall not, unless the Board otherwise directs, be greater than one foot of rise or fall for every twenty feet of the horizontal length of such approach.

2. A good and sufficient fence at least four feet six inches in height from the surface of the approach or structure shall be made and maintained on each side of such approach, and of the structure connected with it.

It seems to me that this section has reference to the relative levels of the highway and the railway as they exist "when the works are completed," that is, to the original construction.

Applying these conclusions of law and the findings of fact of the jury to the several particulars or grounds of claims set out above, the plaintiffs' charges as set out above fall to be dealt with as follows:—

From the answers of the jury it clearly appears that fault in the equipment of the engine and train of the defendant the Pere Marquette Railway Company, as well as negligence in the operation of the train, are negatived. These findings are not attacked on the present appeal, and so the claims designated above as (a), (d), (e), and (f) are eliminated. We are not referred to any evidence in support of claim (b), and as I understand the matter that claim has been abandoned. My view that no statutory obligation is, in the circumstances here shewn, to be imposed on the defendants by secs. 264 and 265 of the Railway Act, eliminates claim (c) and claim (g).

Contributory negligence on the part of the plaintiffs is expressly negatived, and this finding is not attacked.

As the findings of the jury against the defendants are based solely on a breach of the statutory obligations imposed by secs. 264 and 265, and as those sections do not apply to the level crossing here in question, the findings are based upon an erroneous proposition of law, and, that proposition being corrected, the findings disappear: *Pope Appliance Corporation v. Spanish River Pulp and Paper Mills Ltd.*, [1929] A.C. 269, at pp. 272 and 273. Further, as I have already pointed out, there is not set up in the statement of claim (apart from secs. 264 and 265) any basis in law to which the findings in question of the jury can be attached or applied.

The plaintiffs might (for instance) have alleged a nuisance at common law by an obstruction of the King's highway occasioning special damage to the plaintiffs, but they did not do so. Again, they might have alleged that in operating over the crossing in question while it was in a defective condition the railway companies were acting in excess of their statutory powers and were guilty of negligence in failing to discover and remedy the defective condition of the planking: *Guelph Worsted Spinning Co. v. City of Guelph* (1914), 30 O.L.R. 466; *Campbell v. Township of Morris* (1923), 54 O.L.R. 358; *Stevens v. Canadian Pacific Railway Co.*, 15 Can. Ry. Cas. 28. No such allegations have ever been made by the plaintiffs, and no amendment of the record was made or asked for either at the trial or in this Court.

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The question then arises—ought this Court now to direct a new trial and permit the plaintiffs to amend their claim? That depends on whether we are satisfied that justice will be advanced by directing a third trial, with leave to amend, at this late stage. While the Court can set aside the findings of fact by a jury only if they are such as reasonable and honest men could not make, yet that rule has no application in the present case, where the findings are wholly nugatory, and the question is whether an indulgence should be granted to the plaintiffs by according them a new trial with a right to amend their statement of claim. The determination of that question rests in the judicial discretion of the Court itself, upon an untrammelled consideration of the evidence.

My Lord has very accurately and most effectively analysed the facts as disclosed in the evidence, and I have had the privilege of perusing what he has written. To his analysis I cannot usefully add anything, and a perusal and consideration of the evidence, along with his judgment, convinces me that the evidence fails to disclose such facts as make a reasonably triable cause of action on any ground whatever. I am, therefore, of opinion that justice would not be advanced by directing a new trial with leave to amend, and that the action should now be dismissed; but, having regard to the way in which the legal questions now discussed have been brought forward, and generally to the course of proceedings, there should be no costs of the action or of this appeal to either party.

ORDE, J.A.:—I concur in the judgment of my brother Masten and to the extent that he does in that of my Lord the Chief Justice.

FISHER, J.A.:—I agree.

Appeal allowed.

[APPELLATE DIVISION.]

1929.

SCOTT v. SCOTT.

Oct. 25.

Husband and Wife—Alimony—Husband and Wife Occupying Different Flats in one Building—Provision in Judgment Requiring Wife to Vacate Portion Occupied by her—Jurisdiction of Court—Restitution of Conjugal Rights—Absence of Demand—Judicature Act, R.S.O. 1897, ch. 51, sec. 34.

The parties, husband and wife, lived together in a part of a building from 1922 till 1928, when the husband, after a quarrel, "packed up and walked downstairs . . . said he would never live again with her or her children," and established himself in another part of the same building. Each part had a separate entrance. The husband put a lock on his room and told her to stay out, and she stayed,

also putting a lock on her part of the common house. He paid her \$60 a month for the support of herself and child, in addition to which she was supplied with water, light, and heat and had her rooms rent-free. While still living in the building, she brought this action for alimony, complaining that what he allowed her was insufficient. The trial Judge awarded her alimony, and also expressed the opinion that it would be better for the parties to live apart for a time at least. The formal judgment contained a clause adjudging that the plaintiff vacate the premises:—

Held, upon appeal, that the Court had no power to order the wife to leave her husband's roof; and, even if jurisdiction existed, it would not be exercised at the instance of the wife against the protest of the husband.

The Court is an institution organised by the people through their representatives for the purpose of giving to those applying to it their rights according to law, the law not being made by the Court but laid down for it by authority.

The supposed legal maxim, *Boni judicis est ampliare jurisdictionem*, has been discredited, and the more reasonable dictum, *Boni judicis est ampliare justitiam*, substituted: *Rex v. Phillips* (1757), 1 Burr. 292, at p. 304.

The wife's claim to alimony was based solely upon the allegation that her "husband lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights" (*Judicature Act*, R.S.O. 1897, ch. 51, sec. 34); and the plaintiff was not entitled to such a decree, because she had not before action made a written demand for cohabitation and restitution of conjugal rights.

An appeal by the defendant from the judgment of RANEY, J., in favour of the plaintiff in an action for alimony.

The facts are fully set out in the judgment, *infra*.

September 23 and 24. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

F. J. Hughes, K.C., for the appellant, argued that he had not deserted his wife, and that she therefore was not entitled to alimony. The two were living under the same roof, and the wife could pledge the husband's credit: *Gracey v. Gracey* (1870), 17 Gr. 113; *Price v. Price* (1910), 21 O.L.R. 454; *Taylor v. Taylor* (1881), 44 L.T.R. 31; *Jackson v. Jackson* (1923), 40 Times L.R. 45. The Court had no power to order the wife to leave the house and live elsewhere.

[RIDDELL, J.A., asked whether a written demand for cohabitation and restitution of conjugal rights had been made by the plaintiff before bringing action.]

F. W. Griffiths, K.C., for the plaintiff, respondent, admitted that there was no evidence of such a demand, and contended that the evidence shewed that the appellant had deserted his wife. He had told her he would not live with her and had gone away.

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Though the two were living under the same roof, they occupied separate apartments, and so were not living together: C.E.D. (Ont.), vol. 5, p. 614, and cases cited. The appellant is living apart from his wife without sufficient cause, and the respondent would be entitled to a decree for restitution of conjugal rights.

October 25. The judgment of the Court was read by RIDDELL, J.A.:—This is an appeal by the defendant from the judgment at the trial by Mr. Justice Raney, whereby that learned Judge held the plaintiff entitled to alimony.

The facts are somewhat unusual—taking the plaintiff's account the circumstances, they seem to be as follows:—

The parties intermarried in March, 1921, and lived thereafter till the following year in September in a certain place not of importance here. In September, 1922, they removed to the pump-house at Fall's View, the husband being pump-man for the City of Niagara Falls, and his work being at the pump-house. There were born to them two children, one of whom survives, aged five. In 1923, the husband began to use his wife "mean," and would sometimes slap her as well as curse her; as she says, "No matter what I did, I could not please him." They, however, continued to live together till March, 1928, when "he packed up and walked downstairs . . . said he would never live again with her or her children" (applying an offensive but colloquially common appellation to them). Before this time and in February, 1928, the wife had accused him of "running around with another woman," and he had struck her, contending that she was not telling the truth. Nothing, however, is made of that alleged offence; he denied all impropriety, and she does not make it a cause of action. A somewhat acrimonious quarrel took place in March, and, shortly afterwards, he went downstairs, as has been said. Since that time, he has lived downstairs, cooking his own meals, while she has lived with the offspring upstairs; and he has paid her \$60 per month for the support of herself and child; and said that he would pay no more. As the wife puts it: "I am living in the pump-house flat . . . he is living there too. . . . Both in the same building, but he is living downstairs and I upstairs." "He has allowed . . . just \$60 to run the house upon, and feed and clothe the children and feed and clothe myself. . . . We have not any pleasure of it, there is always clothing to buy for the children . . . If I had to take and run a place of my own and buy heat and coal and stuff and pay rent, I could not very well manage on \$60 a month." But, while there is nothing left for pleasure, there does not seem to be any failure on the part of

the husband to supply sufficient for necessaries; she gets, in addition, water, light, heat and coal, as well as a residence rent-free for herself and child, one bed-room, a kitchen, a bath-room, a big room and a hall, the husband having one large room downstairs with separate entrance. Moreover, while the wife says, "I was not glad to see him go, I wanted for him and I and the children to live together for the children's sake," she does not in pleadings or in evidence express any desire for him to resume the former relations; the husband put a lock on his room and told her to stay out, and she stayed. Moreover, she put a lock on her part of the common house. There is no demand for return alleged; and it is fairly evident that the wife's dissatisfaction is confined to the smallness of the amount her husband allows her while, as she says, they are both living under the same roof.

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The learned Judge at the trial asked the plaintiff whether she was willing to go on living there, and she answered: "I do not care to on account of the noise of the pump and that, and in that flat, and then, if he lost his job, where would I be? I would have to go out anywhere." This seems to have been the foundation for a clause in the judgment which, so far as I can find, is wholly without precedent. The learned Judge in his reasons says: "I think it is for the benefit of the parties to live apart . . . for a time at least. . . . It would be better, I should think, if this woman established herself somewhere else in Niagara Falls. . . ." The formal judgment taken out by the plaintiff, in addition to awarding alimony, has this clause: "And this Court doth further order and adjudge that the plaintiff vacate the premises in the pump-house property, now occupied by her, on or before the 1st day of April next, 1929." The defendant did not ask for anything of the kind, and protests against this provision; the plaintiff, through her counsel, insists upon the clause standing.

Much of the argument before us, and, as it seems to me, no little of the proceedings at the trial, could be based upon only an utterly erroneous view of the duty and functions of the Court. The Court is not a self-created body with original powers; it is not a benevolent autocrat with full powers to act as it should think fit; the Court is an institution organised by the people through their representatives for the purpose of giving to those applying to it their rights according to law, the law not being made by the Court but laid down for it by authority; the Court has no right to give a decision in accord with its own views of equity and good conscience, as distinct from the rules laid down for it. The Court has no right to take power unto itself which is

App. Div. not conferred by the people. The supposed legal maxim, *Boni judicis est ampliare jurisdictionem*, derives from times when judges were paid largely by fees and the more cases the more pay; it has been long discredited and the more reasonable dictum substituted, *Boni judicis est ampliare justitiam*: *Rex v. Phillips* 1929.
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Riddell, J.A. (1757), 1 Burr. 292, at p. 304, per Lord Mansfield; Broom, Legal Maxims, 9th ed., p. 57, and notes.

The Court is given no power to order any wife to leave her husband's roof, even if it should "think it for the benefit of the parties to live apart . . . for a time;" and, even if such jurisdiction did exist, it would not be exercised at the instance of the wife herself against the protest of the husband. This clause, obviously, cannot stand in any event, and the appeal to that extent must be allowed.

The power of the Court to award alimony is given by statute. It is exercisable in favour of "any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto, or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights. . . ." (Judicature Act, R.S.O. 1897, ch. 51, sec. 34).

In the present case, the right to alimony is based solely upon the last provision, it being contended that the defendant is living apart from his wife without any sufficient cause and under circumstances which would entitle her by the law of England to a decree for restitution of conjugal rights.

By the law of England, "a written demand for cohabitation and restitution of conjugal rights must be made by the petitioner upon the proposed respondent" before the petition is brought: Browne & Watts, Divorce and Matrimonial Causes, 10th ed., pp. 85, 86; *Forster v. Forster* (1909), 14 O.W.R. 796, at p. 801; and cf. *Edwards v. Edwards* (1873), 20 Gr. 392. The plaintiff is therefore not entitled by the law of England to a decree for restitution of conjugal rights, and this consideration would be sufficient to dispose of the case by allowing the appeal.

Appeal allowed.

[APPELLATE DIVISION.]

REX v. DOMINION WINEGROWERS LTD.

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Oct. 25.

Intoxicating Liquors—Sale of Native Wine by Manufacturer to Person whose Permit had been Cancelled—Liquor Control Act, R.S.O. 1927, ch. 257, secs. 84, 94—Regulations Made by Board—“Ineligible” or “Interdicted” Person—Conviction of Manufacturer Quashed.

A licensed manufacturer of native wines from Ontario grapes was convicted, under sec. 84 of the Liquor Control Act, R.S.O. 1927, ch. 257, of the alleged offence of selling native wine to D., whose permit under the Act had been cancelled, pursuant to sec. 9 (e):—

Held, having regard to the provisions of sec. 94 and other sections of the Act, that sec. 84 has no application to the case of a manufacturer of native wine, but relates solely to the sale of intoxicating liquor by a Government vendor to a person whose permit has been cancelled. Neither regulation 79 nor regulation 85 (made by the Liquor Control Board, pursuant to sec. 94) precluded the manufacturer from selling native wine to D., who was not an “ineligible” or “interdicted” person within the meaning of those regulations.

AN appeal by the defendant company from an order of ELLIOTT, Co. C.J. of Halton, affirming a conviction of the company by a police magistrate for selling native wine to one Deans, a person whose licence under the Liquor Control Act, R.S.O. 1927, ch. 257, had been cancelled, contrary to the provisions of the Act and regulations made thereunder.

October 9. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

G. H. Sedgewick, K.C., for the appellant. The appellant was convicted under sec. 84 of the Liquor Control Act, which provides that no person shall procure or supply liquor to any person whose permit has been suspended or has been cancelled. This section does not apply to manufacturers of native wines, and the penalties prescribed throughout the Act do not apply to manufacturers of native wines. The opening words of sec. 94 make this perfectly clear: “Notwithstanding anything in this Act contained manufacturers of native wines may sell,” etc. The purchaser of native wines from a manufacturer does not require a permit, and the fact that a permit has been cancelled affects only the person holding that permit in his relations with the “vendor” at a Government store. The only liability of the native wine manufacturer is under regulations of the Board, and these contain no provisions similar to sec. 84.

W. B. Common, for the Crown, contended that Deans was “ineligible” under the Act, and the appellant transgressed the

App. Div. provisions of regulation 79 in not guarding against selling to him.
1929. Deans was an "interdicted" person under regulation 85.

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October 25. **LATCHFORD, C.J.**—This is an appeal from the judgment of his Honour J. W. Elliott, Judge of the County Court of the County of Halton, affirming a conviction dated the 23rd May, 1929, whereby the Dominion Winegrowers Limited was convicted of having unlawfully supplied wine to a person whose liquor permit had been cancelled or suspended, and was ordered to pay a fine of \$1,000 and costs.

The appellant is a manufacturer at Oakville of native wine from Ontario grapes; and, having obtained a permit, is authorised by sec. 94 (1) of the Liquor Control Act to sell its product in quantities allowed by the Control Board to be sold for consumption in private residences. Sales, by the same section, are to be subject to any restrictions or regulations which the Board may impose. Many restrictions or regulations have been imposed by the Board—those numbered 77 to 97 affecting manufacturers like the appellant who have duly procured a permit to sell their product. Regulation 79 imposes on such manufacturers "the duty . . . to guard against . . . sales and deliveries of native wine to persons who are ineligible under the Act to purchase liquor." Native wine is included in the definition of "liquor" by sec. 1 (i) of the Act.

On the 14th May, 1929, the appellant sold and delivered six bottles of its native wine to a person to whom an "individual permit" under sec. 37 of the Act had been issued, but whose permit had been cancelled by the Board pursuant to sec. 9 (e), more than a month previous to the sale. It is not suggested that the quantity sold was in excess of that permitted by the Board.

Under date of the 17th April, 1929, W. S. Dingman, director of permits for the Board, issued what he called a "Memorandum for all Vendors," notifying them that certain individual permits had been cancelled for cause, and directing the vendors not to sell to such persons. The wine company was not a vendor. "Vendor" is defined by sec. 31 as a person appointed under the Act to conduct a Government store. The list, however, was mailed at Toronto to the appellant, and, admittedly, duly received. Among the eighty or ninety names appearing on the list was that of the purchaser to whom the six bottles of wine were sold by the appellant within a month afterward.

The charge upon which the appellant was convicted and fined was based on a breach of sec. 84 of the Act—supplying liquor to a person whose permit had been cancelled.

The ground upon which the learned County Court Judge dismissed the original appeal is stated to be that the wine company

was clearly put upon its guard (by the notice) and should not have made a sale to one whose permit to buy had been cancelled; and the fact that the notice was overlooked by accident afforded no assistance as a defence.

Having regard to the provisions of sec. 94, the only obligation to which the appellant was subject either under the Act or the regulations was to guard against—that is, to take precautions against (*Murray's New English Dictionary, sub verb. "Guard"*)—selling to persons ineligible under the Act to purchase liquor. Even assuming that the person to whom the sale was made was ineligible—as to which I express no opinion—the company's officers were careful to defend themselves against making such sales. The evidence is uncontradicted that they were always solicitous to comply with the Board's requirements. In this case the inadvertence of a clerk to the notice—and it was nothing more—was not in my opinion an act forbidden by the statute.

The appeal should therefore be allowed and the conviction quashed.

RIDDELL, J.A.:—This is an appeal from the judgment of his Honour Judge Elliott, County Court Judge of Halton, affirming a conviction by a police magistrate “whereby the said Dominion Winegrowers Limited was convicted of having unlawfully supplied liquor to one D., whose liquor permit is or has been cancelled or suspended, contrary to sec. 84 of the Ontario Liquor Control Act, and was ordered to pay the sum of \$1,000 and \$6 costs.”

D. had had a permit under the Liquor Control Act, but it had been cancelled, and notice of the cancellation given to the defendant, by a copy of a circular letter, addressed to “Vendors.”

The Crown claims—and in the courts below effect has been given to the claim—that D., by the cancellation of his permit, was “interdicted,” and it became illegal under the Act for the defendant to sell native wine to him. I am of opinion that this is an erroneous interpretation of the provisions of the Act.

Section 94 (1) of the Act reads:—

“Notwithstanding anything in this Act contained but subject to any regulations or restrictions which the Board may impose, manufacturers of native wines from grapes or cherries grown and produced in Ontario may sell, keep, or offer for sale and deliver the same in such quantities as may be permitted by the Board for consumption in a private residence.”

The only “regulation” or “restriction” made by the Board, except No. 85 later to be mentioned, that bears on this matter, is part of No. 79, which reads thus:—

“It shall be the duty of every manufacturer of native wine to

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guard against fictitious or unauthorised names and addresses, and against sales and deliveries of native wine to persons who are ineligible under the Act to purchase liquor or whose residences are not places where under the Act liquor can lawfully be kept."

Assuming that this is a valid "regulation" or "restriction," all it directs is care not to sell or deliver to "persons . . . ineligible under the Act;" and, in the present case, the sale was by inadvertence.

No assistance can be obtained for the Crown's case from the circular sent to "Vendors" by an officer of the Board, dated the 17th April, 1929; that contains a direction to vendors only, not to issue a permit or sell liquor to certain persons named. This is not a "regulation" or "restriction" of the Board, but a simple direction to the class of persons known as "vendors," and frequently referred to in the Act, for example in secs. 9 (k), 12 (b), 24, 31, 32, 43 (5), 57, etc. It is not a direction to an entirely different class mentioned in the Act as "manufacturers of native wine." There is no need for any one who desires to purchase of such manufacturers to obtain a "permit"—the permit is necessary to purchase from the "vendor" who is in charge of sales at the Government store: secs. 31, 32. Before D. obtained his permit, there can be no pretence that it would be unlawful for the manufacturer to sell its product to him. It would certainly be an extraordinary result if he, by buying a permit, incapacitated himself from buying if and when it was taken away. To give the Act such an interpretation, there would be need of very plain and unambiguous words, and that the more especially in a *quasi-criminal* statute—such statutes being always read strictly. There is nothing in the Act specifically forbidding such a sale.

But regulation 85 is appealed to, which reads:—

"85. Native wine shall not be sold to any person against whom an order of interdiction has been made, or at any time, or in any quantities, except as permitted by the Act and by these regulations."

I assume, for the purpose of this case, that this regulation is valid and binding upon the defendant. It will be seen that the person to whom sales may not be made is one "against whom an order of interdiction has been made," with which may be compared the definition in sec. 1 (g) of the Act: "Interdicted person" shall mean a person to whom the sale of liquor is prohibited by order under this Act." The provision for an "order" prohibiting is sec. 95; and the person against whom such an order is made is the only "interdicted person" recognised by the Act; cf. secs. 96, 97, 98.

There is no evidence that D. had had an order of interdiction

made against him; and I am of opinion that there is nothing in the Act which makes it illegal for a manufacturer properly licensed to sell native wines to him.

I would allow the appeal.

MASTEN, J.A.:—Appeal from the judgment of his Honour J. W. Elliott, sustaining the conviction of the appellant for that it “did supply liquor to one Dr. F. M. Deans, whose permit is suspended or has been cancelled, contrary to section 84 of the Ontario Liquor Control Act,” and imposing a fine of \$1,000 for such offence and \$6 costs.

The liquor supplied was native wine, of which the appellant is a manufacturer, operating as such under a licence from the Liquor Control Board. The licence to the appellant to carry on its business of manufacturing and selling native wine is issued in pursuance of sec. 94 (1) of the Liquor Control Act, which reads as follows:—

“Notwithstanding anything in this Act contained but subject to any regulations or restrictions which the Board may impose, manufacturers of native wines from grapes or cherries grown and produced in Ontario may sell, keep, or offer for sale and deliver the same in such quantities as may be permitted by the Board for consumption in a private residence.”

The sale here in question was admittedly a sale of native wine falling within the above section. Sales made pursuant to this section are made directly by the manufacturer, and not through an employee of the Liquor Board, called a “vendor” and defined by sec. 31, and no permit is required by the purchaser in order to legalise such a sale to him by the appellant.

The infirmity in the judgment *à quo* appears to me to be that the learned County Court Judge has overlooked the fact that by the Liquor Control Act the sale of native wine by manufacturers of that product is distinct from and independent of the provisions for sale of all kinds of liquor to permit-holders by the employees of the Liquor Control Board. In my view there are two separate systems of sale provided by the Act:—

(1) Sale of all kinds of liquor by the Liquor Control Board through its employees, the licensed vendors, *to permit-holders only*.

(2) Sales of native wine by its manufacturers regardless of whether the purchaser holds a permit or not, and subject only to the regulations promulgated by the Liquor Control Board as provided in sec. 94.

The separation and distinction are clearly marked by the opening words of sec. 94 (1), quoted above, “Notwithstanding anything in this Act contained.” I think that the effect of this section is to provide that the sale of native wine by persons manufacturing that product shall be governed by sec. 94 and the regulations

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App. Div. of the Board passed in pursuance of it, subject only to any sections
1929. of the Act itself dealing in specific terms with such sales, but
 REX excluding other provisions of the Act.

v. My consideration of the whole scheme of the Act, and particularly of such provisions as are exemplified by sec. 1 (*m*), by the
 DOMINION terms of the permit issued by the Board, and by secs. 32 and 84
 WINE-
 GROWERS of the Act, confirms me in the view which I have expressed above.
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Masten, J.A. From another point of view the same conclusion results. Dr. Deans had the right to purchase native wine from the appellant before he got a permit. During its currency, his permit enabled him to buy liquor generally from the vendors acting for the Liquor Control Board, and when his permit was cancelled he reverted to the position of one who had never had a permit. The two methods of sale are separate and distinct from each other, and the securing of a permit or its subsequent cancellation has nothing to do with the right to purchase native wine as conferred by sec. 94 (1). When his permit was cancelled, Dr. Deans could no longer buy liquor from a vendor, but, like any person who had never had a permit, he could buy native wine from the appellant, unless some regulation of the Board prevented the appellant from selling. If I am right in this view, sec. 84 (in pursuance of which the conviction in question was made) has no application to the facts here in question, but relates solely to the sale of liquor by a Government vendor to a person whose permit has been cancelled. So far, therefore, as the conviction in question is based on a breach of sec. 84 of the Act, it is without any legal foundation and must be reversed, unless some regulation or restriction duly promulgated by the Board pursuant to sec. 94 of the Act renders the action of the appellant illegal and permits an amendment of the conviction. For that purpose the Crown, in supporting the conviction, relied on regulations 79 and 85. I agree with the conclusion and reasons of my brother Riddell that neither of these regulations precluded the appellant from selling native wine to Dr. Deans, and only desire to add that, in my view, for the reasons which I have endeavoured to state above, Dr. Deans was not "an ineligible person" within the meaning of regulation 79 at the time when he purchased the native wine here in question.

If it should hereafter appear desirable to prevent the sale of native wine to a person whose permit has been cancelled, that result can readily be accomplished by means of regulations promulgated by the Board under the authority of sec. 94 (1); but, as those regulations stood at the time when this transaction occurred, they did not, in my opinion, prohibit the sale in question.

The conviction should be quashed.

ORDE and FISHER, JJ.A., agreed with MASTEN, J.A.

Appeal allowed.

[WRIGHT, J.]

CRAWFORD V. IMPERIAL TRUSTS CO. OF CANADA.

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Oct. 28.

Agency—Agent's Commission on Sale of Land—Contract—Construction Statute of Frauds, R.S.O. 1927, ch. 131, sec. 11—Changes in Terms of Agreement of Sale not Affecting Agent's Rights—Action against two Companies—One Professing to Contract as "Agents" for the other—Exclusion of Liability of Former.

The plaintiff sued two companies for a commission on the sale or exchange of property. In a letter of the 22nd April, 1927, signed by the defendant the I. company, addressed to the plaintiff, that company, "as agents" for the other company, promised to pay the plaintiff, "in reference to the offer to purchase the S. Apartments by D. T. . . . commission at the rate of 3½ per cent. upon the price realised in mortgage and cash on the sale, the payment to be made when the sale is completed to the satisfaction of this company the commission is to be paid when the equities made as a deposit are realised on, or by the 1st of October, 1927:"—

Held, that this letter should be construed, in regard to the sum upon which the commission was to be paid, as referring to all the considerations received by the I. company in connection with the sale to D. T.; and the letter satisfied the provisions of sec. 11 of the Statute of Frauds.

Held, also, that the plaintiff's claim was not affected by changes made in the agreement between D. T. and the defendants—if the defendants saw fit to vary the terms of the agreement and accept property in lieu of cash, that should not prevent the plaintiff from obtaining payment of his commission, which he earned when he procured a binding agreement for the sale of the property.

Cross v. Wood (1921), 50 O.L.R. 15, followed.

Held, also, that the words "as agents" in the letter were used not as words of description but as excluding liability on the part of the I. company; and there should be a judgment for the plaintiff against the other company only.

Parker v. Winlow (1857), 7 E. & B. 942, distinguished.

AN action by J. C. Crawford against the Imperial Trusts Co. of Canada and the Alberta Central Land Corporation Ltd. to recover a commission on the sale or exchange of property under an agreement in writing.

The action was tried before WRIGHT, J., without a jury, at a Toronto sittings.

G. W. Mason, K.C., and *R. L. Kellock*, for the plaintiff.

A. C. McMaster, K.C., and *G. M. Willoughby*, for the defendants.

October 28. WRIGHT, J.:—In this action the plaintiff seeks to recover from the defendants, or one of them, commission on the sale or exchange of property under an agreement in writing which reads as follows:—

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OF CANADA.“J. C. Crawford, Esq.,
“Toronto.“Toronto,
“22nd April, 1927.“*Re Secord Apartments.*

“Dear Sir:—In reference to the offer to purchase the Secord Apartments by D. Tulloch, dated the 20th April, 1927, for the sum of \$115,000.00, this company, as agents for the Alberta Central Land Corporation Limited, are prepared to pay you commission at the rate of 3½% upon the price realised in mortgage and cash on the sale, the payment to be made when the sale is completed to the satisfaction of this company.

“It is more especially agreed that the commission is to be paid when the equities made as a deposit are realised on, or by the 1st of October, 1927.

“Yours truly,

“The Imperial Trusts Company of Canada,

“By J. A. Withrow,

“Manager.”

The evidence disclosed that the plaintiff had procured one David Tulloch to make an offer in writing under date of the 20th April, 1927, for the purchase of the apartments referred to in the letter as the Secord Apartments, to the defendant the Imperial Trusts Company of Canada. This offer was accepted on the 21st April, 1927, by the said defendant in writing under its corporate seal, attested by two directors and the manager of the company, as agent for the owner.

The stipulated consideration for the sale consisted of the conveyance of certain equities in properties in the city of Toronto and the equity in a farm in the township of Peel, in the county of Wellington, a cash payment of \$15,000, and a mortgage on the Secord Apartments for \$85,000.

The two parcels of land in Toronto were duly conveyed, but the equity in the farm in the township of Peel was not conveyed, as Mr. Jackson, the president of the defendant companies, and Mr. Withrow, the manager, considered it to be of little or no value. Instead of the cash payment the defendants accepted a conveyance of certain lands in the city of Toronto. The mortgage for \$85,000 on the Secord Apartments was duly executed and delivered to the Imperial Trusts Company of Canada. The two properties in the city of Toronto mentioned in the original offer were sold prior to the commencement of the action.

On the completion of the deal, when the adjustments were made, there was a balance of \$882 due by the purchaser Tulloch. This was arranged by an assignment of rent to the defendant the Imperial Trusts Company, so that the transaction in its modified or changed terms was carried through.

On the 13th January, 1928, the defendant the Imperial Trusts Company of Canada, by J. A. Withrow, its manager, at the request of the plaintiff, wrote a letter to the First National Bank, Detroit, Michigan, in the following terms:—

“The First National Bank,
“Detroit, Mich.

“Dear Sirs:—This company will owe Mr. J. C. Crawford the sum of \$2,500.00 on the 1st November, 1928.

“Yours truly,

“The Imperial Trusts Company of Canada,
“By J. A. Withrow,
“Manager.”

In January, 1929, the plaintiff and Withrow endeavoured to arrange the claim of the former for his commission by having a portion of it applied on a mortgage on certain of the plaintiff's properties, and the balance in the manner set forth in the writing referred to as a receipt, which reads as follows:—

“14th January, 1929.

“Received from the Alberta Central Land Corporation Limited the sum of four thousand and thirty-five....50/100 Dollars in full of commission *re* sale of Secord Apartments.

“\$4,035.50 applied as follows:—

Repayment of balance of principal and interest S. M.

Crawford mtge. E1½ lot 7, 4th con.	\$2,609.90
“ <i>re</i> E1½ lot 6, 4th con.	51.08
Three months' rent, Apt. 4, 31 Winchester St.	180.00
Overdraft on deposit a/c	14.95
Balance paid to Canadian Bank of Commerce 1352	
West Toronto Branch	1,179.57
	—————
	\$4,035.50

“J. C. Crawford.”

It appears, however, that nothing was done by either of the defendant companies to carry out this arrangement, although, according to the plaintiff's evidence, Withrow told him that the cheques necessary to complete the arrangement had been sent out

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Wright, J. to be signed. I accept the plaintiff's evidence in respect of this matter.
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OF CANADA. At the trial a copy of the journal entry appearing in the books of the defendant the Alberta Central Land Corporation Limited, under date of the 31st August, 1927, was put in. It reads as follows:—

Dr.

"August 3. Secord Apartments property account.....\$4,035.50
Cr.

"J. C. Crawford account\$4,035.50
 Commission at 3½% on sale and exchange of
 Secord Apartments, \$115,300.00, to be paid
 subject to realising equities in property ex-
 changed."

Various defences were set up at the trial and strenuously pressed by counsel for the defendants. These defences may be classified as follows:—

1. That there was no agreement in writing as required by the Statute of Frauds, R.S.O. 1927, ch. 131, sec. 11.

2. That the letter which purported to contain the said agreement was not the real agreement made between the parties, and therefore the true agreement was not in writing and did not comply with the statute already cited.

3. That the transaction finally consummated between the defendant companies and Tulloch, the purchaser, was so entirely changed or varied from that in respect of which the agreement to pay commission was made as in effect to constitute an entirely new agreement, and therefore the agreement to pay the plaintiff commission did not apply to the transaction as finally consummated.

In addition to the foregoing defences, counsel for the defendants contended that the plaintiff could not in any event recover against the defendant the Imperial Trusts Company of Canada and that his recourse, if any, was against the other defendant, and he claimed that the plaintiff was bound to elect, before proceeding to trial with his claim against both, as to which defendant he sought to hold liable.

The evidence disclosed that the defendant the Alberta Central Land Corporation Limited was a holding company for its co-defendant company. It was admitted that, except as to five shares held by the directors, the stock in the Alberta Central Land Corporation Limited was held by its co-defendant, the Imperial Trusts Company of Canada, also that the Imperial Trusts Company of Canada managed the affairs of its co-defendant company, that all

the directors of the Alberta Land Corporation Limited were directors of the Imperial Trusts Company of Canada, but that the converse was not the case.

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I shall now proceed to deal with the several defences in the order stated.

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In respect of the defence that there was no agreement in writing sufficient to satisfy the Statute of Frauds, R.S.O. 1927, ch. 131, sec. 11, counsel for the defendants contended that according to the evidence given by the plaintiff on his examination for discovery, and read at the trial, the letter of the 22nd April, 1927, did not truly represent the agreement, and in support of this he read certain questions from the examination for discovery of the plaintiff. As these questions are somewhat material, I shall extract them here:—

“51. Q. Then you notice there is an agreement to pay on the price realised on the mortgage and cash on the sale? A. Yes, it says so.

“52. Q. It is not an agreement to pay commission on equities, is it?

“Mr. Kellock: It speaks for itself.

“A. Well, this last clause here says, more especially, ‘commission to be paid when equities made as a deposit are realised on.’

“53. Q. But you have no claim to collect commission on equities, have you? A. Well, as far as I understand it, my claim is for 3½% on \$115,300.

“54. Q. The mortgage back and \$15,000 cash? A. That would not be it. That would be contradictory. That would only be \$100,000, so that shews this contract couldn’t be right if I didn’t get anything on the equities. That would only be \$100,000, and it says plainly I am to get commission on \$115,300.

“55. Q. Your idea was then the contract you had was to pay you commission on \$115,300? A. \$115,300.

“56. Q. Not merely on the mortgage back and on the cash? A. No, I am to get commission on the \$115,300, the amount the apartment was sold for. If you took it the other way, why there would only be \$100,000.

“57. Q. And that would not be right? A. No, because it says \$115,300.”

It will be observed that in his examination the plaintiff asserts that he is entitled to commission on the entire purchase-price, namely, on \$115,300, while the defendants say that under the terms of the letter he was only entitled to be paid his commission on the basis of the moneys realised in mortgage and cash, which in effect would be restricting his commission to a percentage on \$100,000.

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I think a fair construction of the letter of the 22nd April, 1927, supports the plaintiff's contention. It will be noted that the commission is to be paid when the equities made as a deposit are realised on, or by the 1st October, 1927. This would appear to amplify or explain what was referred to in the earlier paragraph, "by mortgage and cash." It was within the contemplation of all parties that the defendant companies would sell the equities as soon as possible and thereby realize cash, so that I think it would be doing the language of this letter no violence to construe its terms to include all the considerations received by the company in connection with the sale. This defence therefore fails.

Dealing now with the question as to the change or variation made in the agreement between the purchaser Tulloch and the defendants, I do not think the plaintiff is affected in the slightest by these variations. He procured the sale of the Secord Apartments, and if the defendants saw fit to vary the terms of the agreement and accept property in lieu of cash this should not prevent the plaintiff from obtaining payment of his commission, which he earned when he procured a binding agreement for the sale of the apartments.

This view is in harmony with the decision in *Cross v. Wood* (1921), 50 O.L.R. 15, and the authorities cited in that case.

I think the third defence has been disposed of in the reasons I have already given in dealing with the second branch of the defence, so I shall not further enlarge upon that branch of the defence.

This leaves for consideration the question as to which of the defendants is liable to pay the commission. Counsel for the plaintiff contended that he was entitled to recover from the Imperial Trusts Company of Canada, and relied for that upon the case of *Parker v. Winlow* (1857), 7 E. & B. 942; *M. Brennen & Sons Manufacturing Co. Ltd. v. Thompson* (1915), 33 O.L.R. 465; and *Kimber Coal Co. v. Stone and Rolfe Ltd.*, [1926] A.C. 414.

I do not think that the case of *Parker v. Winlow* is in point. In that case the memorandum was expressed to be made between Parker and Winlow, agent for E. W. & Son, and it was signed by Winlow without any restriction. Upon these facts the Court held that the agent was personally liable. Crompton, J., in his judgment, at p. 949, says:—

"Mere words of description attached to the name of a contractor, such as are used here, saying he is agent for another, cannot limit his liability as contractor. A man, though agent, may very well intend to bind himself; and he does bind himself

if he contracts without restrictive words to shew that he does not do so personally."

This appears to be the *ratio decidendi* of the judgment.

This case was followed by *Paice v. Walker* (1870), L.R. 5 Ex. 173, where the signature was as agents, and it was held that, having regard to the contract and all the circumstances of the case, the words "as agents" must be construed as merely describing or intimating the fact that the defendants were agents, and did not amount to a statement that they were making a bargain on account of any person.

The case of *Paice v. Walker* was overruled by the decision of the Court of Appeal in *Gadd v. Houghton* (1876), 1 Ex. D. 357, and is not now regarded as good law. See also *Universal Steam Navigation Co. v. James McKelvie & Co.*, [1923] A.C. 492.

In the present instance it will be noted that the promise to pay by the defendant the Imperial Trusts Company of Canada is "as agents for the Alberta Central Land Corporation Limited," and I think these words are used not as words of description but as limiting the liability of the defendant the Imperial Trusts Company of Canada so as to exclude any personal liability on its part.

Adopting this view, the plaintiff's recourse is solely against the Alberta Central Land Corporation Limited, and judgment will be against that company for the amount sued for, with interest from the issue of the writ at five per cent.

The action will be dismissed as against the Imperial Trusts Company of Canada, but without costs.

[MEREDITH, C.J.C.P.]

LAMBERT V. ANGLO-SCOTTISH GENERAL COMMERCIAL INSURANCE CO. LTD.

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Oct. 11.

Insurance (Fire)—Ownership of Property Insured—Insurable Interest—Provision of Policy—"Occupied" Premises—Evidence—Contract Excluding Unoccupied Property—Whether Condition—Insurance Act, R.S.O. 1927, ch. 222, sec. 98—Amendment by 19 Geo. V. ch. 53, sec. 12—Wh^ter Applicable when Loss Occurred before Passing—Defence to Claim Passed into Cause of Action—Statutory Condition 5—Breach of—Building Unoccupied for more than 30 days—False Description of Building—Materiality.

The plaintiff was held, to have an insurable interest in property which had been placed in his name by his brother for the purpose of preventing his brother's creditors getting it.

By the terms of the policy issued by the defendants, it covered the building insured "only while occupied, constructed, and situated as

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described." A fire occurred on the 18th October, 1928. The plaintiff was not then living in the building, though he had left some furniture and clothing there, and no one else lived there:—

Held, that the property was not "occupied" at the time of the fire within the meaning of that word in the policy.

Held, also, that the defendants had the power to make a contract applicable to occupied property only; and that no court had the right to turn the contract of the parties into a mere condition, especially one against which the Court might relieve.

And *held*, that the amendment of the Ontario Insurance Act, R.S.O. 1927, ch. 222, which became effective on the 28th March, 1929, did not take away the defendants' right of defence to a claim that arose on the 18th October, 1928, when the property insured was destroyed.

Sembles, that, on the passing of the amending Act, the defendants might have avoided the policy altogether, if the amendment affected their contract.

Held, also, that there was a breach of statutory condition 5, the building insured having been to the knowledge of the plaintiff, vacant or unoccupied for more than 30 days.

The building was described by the plaintiff as being upon a foundation of concrete blocks and the chimney as running down to the ground. In fact there was not a solid foundation but merely cement blocks at different points; if there was anything between, it was wood only; and the chimney was supported only on brackets above the ground:—

Held, that the condition of the building was misdescribed, and the misdescription was material to the risk.

And upon all these grounds the plaintiff's action upon the policy failed.

THE plaintiff sued for \$1,200 loss by fire covered by a policy issued by the defendants. The loss by fire took place on or about the 18th October, 1928.

The defendants pleaded, *inter alia*, that the policy had been obtained by falsely describing the property as having a solid foundation on concrete blocks and a solid brick chimney built from the ground, whereas there was no such chimney, and the building was erected on a number of concrete piers placed at various points to support the building.

The defendants further pleaded that the building had been unoccupied for a period of more than 30 days, and therefore under the Insurance Act, R.S.O. 1927, ch. 222, sec. 98, there was no liability.

The defendants also alleged that, in any event, the policy covered the building "only while occupied, constructed, and situated as described," and stated that the building was not occupied at the time of the fire.

Although he was not sleeping there or getting his meals there at the time, the plaintiff asserted that the building was occupied, as he had left his clothes there and had gone back from time to time to change them and see if the building was all right.

October 10 and 11. The action was tried before MEREDITH, C.J.C.P., without a jury, at a Toronto sittings. 1929.
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J. L. G. Keogh, for the plaintiff.
A. C. Heighington, K.C., for the defendants.

Cooper v. Toronto Casualty Insurance Co. (1928), 62 O.L.R. 311, and the cases there cited, were referred to by counsel.

Section 98 of the Ontario Insurance Act, R.S.O. 1927, ch. 222, was amended in consequence of the *Cooper* case, by 19 Geo. V. ch. 53, sec. 12. Subsection 1 of sec. 98, as amended, reads as follows:—

“(1) The conditions set forth in this section shall be deemed to be part of every contract in force in Ontario, except contracts where the subject-matter of the insurance is exclusively rents, charges or loss of profits, and shall be printed on every policy with the heading ‘Statutory Conditions,’ and, subject to the provisions of section 102, no variation, omission or addition thereto shall be binding on the insured, nor shall anything contained in the description of the subject-matter of the insurance be effective in so far as it is inconsistent with, varies, modifies or avoids any such condition.”

The amendment became effective on the 28th March, 1929, and the fire took place on the 18th October, 1928.

For the plaintiff it was argued that, the amendment being part of the contract of insurance, the limitation of the risk by the policy was not effective.

October 11. MEREDITH, C.J.C.P. (at the conclusion of the argument on behalf of the plaintiff):—There are several questions involved in this action, and I am very much indebted to Mr. Keogh for the clear, logical, and careful manner in which he has said all that could be said in favour of the plaintiff. But he has failed to convince me that he has a right of action.

The first question involved in the case is, whether the plaintiff is the owner of the property in question, or had an insurable interest in it.

I find that he had. I cannot place much confidence, if any, in the testimony of the plaintiff or of his brother. It is quite evident from the manner in which the plaintiff gave his evidence that his mind and memory have been injuriously affected by something, and I gathered from what his brother said in the witness-box that that is so, and that he was in some institution in respect of it. Whether or not, it is perfectly clear that his mind and memory are defective; that he really knew nothing about this

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matter except in regard to his own personal actions; he does not profess to have done anything in regard to matters of business—everything of that kind was left to his brother.

I find that the brother failed in business and became voluntarily a bankrupt, in 1927, I think. I find that he put this property in the name of his wife first, and afterwards in the name of the plaintiff, for the purpose of preventing his creditors getting it.

But that does not deprive the plaintiff of an insurable interest. As against those who conveyed the land to him, the deed is binding. If an action were brought to recover the property on that ground it would fail. On that point I find, on the law in favour of the plaintiff.

The second question is, whether this insured property was "occupied," within the meaning of that word as used in the policy. I find very clearly that it was not occupied within the meaning of the word as employed in the contract between the parties.

The property came to be the plaintiff's in the way I have mentioned. He and his mate, two workmen working together in the neighbourhood, used it for the purpose of lodging for a short time while they were working there; he had some bed-room furniture there and left some of his clothing there. While they were lodging in the house, they boarded with Mrs. O'Neal, a next-door neighbour. They went away and obtained work elsewhere, and I am unable, on the whole evidence, to find that either of them ever went near the place after that until after the fire. Why should the plaintiff? If he did, is it not almost certain that Mrs. O'Neal would have seen him, that he would have gone there for his food, or if only to pass the time of day with her? She testified that he did not and that she never saw him during that interval. There is not a tittle of evidence in support of his statements, upon which statements I cannot rely.

I find that the property was not occupied within the meaning of the word "occupied" in the policy.

Then it is said that an insurer cannot make a contract of that character. Why not? It seems to me to be childish to contend that an insurer cannot confine his business to occupied property, that he cannot make a contract that the property is insured only whilst occupied. Also it seems to me somewhat childish to contend that that must necessarily be a condition. Parties may make it a condition if they choose, or they may make it the ruling feature of the contract.

That they did. No court has the right to turn the contract of the parties into a mere condition, especially a condition against which the courts might relieve.

Then it is said that that was all very well until last winter, when the Legislature altered the law.

The Legislature had the power to alter the law, and they certainly did to some extent. But they did that after this contract had come to an end, as far as it was insurance. It had passed into a cause of action. The insurance part of it was dead, because the property insured was destroyed.

The law is generally strongly opposed to giving retrospective, retroactive, or *ex post facto* effect to any legislation. I fancy it would be difficult to find any case in which the law has taken away a right of action that has arisen, or a right of defence that has arisen. I cannot think that the Legislature had any intention to do a thing of that sort in such a case as this. And, if they had, they have not done it.

Another consideration is, that, if a right of action was given, it would have deprived the insurers of the right, which they ought to have had, to say: "Well, if the Legislature will not let us contract in the way we want to contract, we will not contract at all." Upon the passing of that Act they might, so far as the contract gives them power to do so, have avoided the policy altogether. If this Act applies to this case, it deprived them of that reasonable right, which I am sure the Legislature must have meant that they should have.

And the plaintiff's difficulties are not ended yet. There is a condition in the policy, a statutory condition, not one made by the parties themselves, but one imposed upon them, that, if the property is vacant or unoccupied for 30 days, the policy cannot be enforced.* This property was knowingly and intentionally unoccupied for more than that length of time. Again I must say that it is futile to argue to me that it was occupied. The purpose of requiring it to be occupied is to save it from being burned, to save a loss which means money or property—just so much money or property thrown away. It is in the interest of one who is honest to prevent fires. Fires cause loss and do no good—just so much thrown away. It is in the interest of every one to prevent fires, except that despicable interest of a man who burns his property in order to get the insurance-money.

There was no one in or about this place to protect it. The danger of loss by fire was just as great as, if not greater than, if

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* R.S.O. 1927, ch. 222, sec. 98, condition 5: "Un'ess permission is given by the policy or endorsed thereon, the insurer shall not be liable for loss or damage occurring . . . (d) when the building insured or containing the property insured is, to the knowledge of the insured, vacant or unoccupied for more than 30 consecutive days . . ."

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the man's furniture and what clothing he had there had been a thousand miles away, and he a thousand miles away.

I must find that upon this ground also the action fails. There was a breach of that condition of the policy.

Then there is a further point: the place was described as being upon a foundation of concrete blocks, and the chimney as running down to the ground. It turns out that there was not a solid foundation, but only cement blocks at different points; if there was anything between, it was wood only. There is no evidence as to whether it was open, or closed with wood. And it is common knowledge that a chimney supported only on brackets above the ground is very much more dangerous than one that is on a solid foundation. That is obvious.

I ought to find, on the whole evidence, that this information as to the condition of the building came from the plaintiff's brother to Mr. Flett, his solicitor, and went from Mr. Flett to the insurance agent, to obtain this policy.

It is quite manifest—even without evidence I should think it was manifest—that these things were material to the risk. There was some reduction of premium on the statement that they existed. I must find against the plaintiff on this point also.

On the whole evidence I must dismiss the action.

But the defendants made a serious charge against the plaintiff in their pleadings and withdrew it at the trial—that should deprive them of costs.

Action dismissed without costs.

[APPELLATE DIVISION.]

1929.

Oct. 25.

MALONEY v. HAMILTON STREET RAILWAY CO.

Negligence—Motor-vehicle on Highway—Collision with Street-car—Finding of Jury—No Evidence to Support—Reversal on Appeal—Dismissal of Action—Duty of Motorman—Precaution to Avoid Danger Reasonably to be Anticipated.

The Court will not interfere with the finding of a jury except where they have made a finding which no reasonable and honest men could make.

In an action for damages for injury to the plaintiffs' automobile and personal injuries to one of the plaintiffs seated therein by a street-car of the defendants, the only negligence alleged was the opening of a door of the street-car when passing the plaintiffs. The jury negatived this negligence, but found that there was negligence of the defendants "in not using proper precaution in stopping the car":—

Held, that, there being no evidence to support this finding, it should be disregarded and the action dismissed.

It was the duty of the defendants' motorman to take all due precautions to avoid a danger which was reasonably to be anticipated; but he could not have anticipated that the driver of the automobile which he saw in front of him was going to run her vehicle out from the kerb so as to be in his way; and, when he saw that an accident was imminent, he did everything possible to prevent a collision

AN appeal by the defendants from the judgment of the County Court of the County of Wentworth, upon the findings of a jury, in favour of the plaintiffs.

The facts are stated in the judgments.

October 7. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

C. W. Gibson, for the appellants.

M. J. O'Reilly, K.C., for the plaintiffs, respondents.

October 25. RIDDELL, J.A.:—In this case, which arose from a collision between a car of the defendants and an automobile driven by the plaintiff Maloney, the other plaintiff being her passenger, the jury on the trial in the County Court found the plaintiff Irene Maloney guilty of 40 and the defendants of 60 per cent. of the negligence; and judgment was directed to be entered accordingly. The defendants now appeal.

We have in this Court, on many occasions, expressed our very great reluctance to interfere with the findings of fact by a trial jury; and we do not interfere except in an extreme case—a case in which the jury has made a finding which no reasonable and honest men could make—a jury having no more right than a Judge to disregard the evidence or to find anything as a fact without evidence sufficient to support the finding. It must be unnecessary to cite authority for so well-established a principle.

An examination of the evidence in the present case shews that the finding of negligence on the part of the defendants is wholly unjustified.

The defendants' street-car was proceeding west on King-street in the city of Hamilton; the plaintiff Irene Maloney had her car parked on the north side of the street, while she and her passengers were in a restaurant; they, coming out from the restaurant, took their places in the automobile, and Irene Maloney, acting as chauffeur, started out from the kerb and proceeded westerly. The street-car following came in contact with the automobile, and the damage was caused which is the basis of the action.

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At the trial, counsel for the plaintiffs opened stating the facts upon which he relied for a cause of action in the following words:—

"The plaintiff Irene Maloney and the other plaintiff Sarah Smith were in a car on King-street between Ferguson-avenue and Walnut-street. The plaintiffs were driving on the right side of the road, at a moderate rate of speed, and the street-railway car came along and was about to pass, and when the car got past the front part of the automobile, the officers of the railway company opened the door on the side of the car and struck the plaintiffs' car in the rear, damaging the plaintiffs' car, and seriously shocking Mrs. Sarah Smith."

The whole negligence alleged was the opening of a door of the street-car when passing the plaintiffs' automobile. This the plaintiff Irene Maloney makes clear in her evidence. I extract a few sentences:—

"I wasn't on the tracks; if the door hadn't been opened they would never have struck me because I was not near enough to strike."

"Q. So, if the car had come along ordinarily, with the door closed, it would not have hit you? A. No.

"Q. You are quite clear on that? A. Yes.

"Q. And it was after your car had gone 5 or 6 car-lengths that the door opened and struck you from the rear, you say? A. Yes."

The jury have negatived this—and, indeed, evidence that cannot be controverted makes it plain that the door was not opened as alleged, nor was it open at all till after the impact. The only negligence found by the jury is thus expressed: "In not using proper precaution in stopping the car"—I presume what is meant is that the defendants did not take proper precautions and stop the car when and where it should have been stopped, and not negligence in the actual stopping.

The care to be taken by any one is determined by the circumstances in which he finds himself. The undoubted duty exists to take all due precautions to avoid a danger which is reasonably to be anticipated; and if, in the present case, the motorman had any reason to anticipate that the plaintiff would place herself in front of his car, he might well be called on to take precautions against a collision with her, or, when he saw that danger was imminent, he might well be called on to do everything possible to stop his car. But there is no law—nor is it common sense—that the motorman should be a mind-reader so as to know the intentions of any chauffeur. I can find nothing in the present case which so much as indicates that the motorman should have anticipated that the driver of the automobile which he saw in

front of him on the side of the street was going to run her car out so as to be in his way and an accident would take place. And, when he saw that an accident was imminent, he did all possible to prevent a collision—in vain, indeed, but that was not his fault.

I would allow the appeal and dismiss the action, with costs here and below.

MASTEN, ORDE, and FISHER, J.J.A., agreed with RIDDELL, J.A.

LATCHFORD, C.J.:—This appeal is from a judgment of his Honour W. T. Evans, Judge of the County Court of the County of Wentworth, based upon findings made by a jury awarding \$86.46 to Irene Maloney and \$350 to her mother and co-plaintiff Sarah Smith. Both Mrs. Maloney and the defendant were found to have been negligent in the ratio, respectively, of 40 to 60.

The statement of claim alleged that on the 20th October, 1928, about 10 p.m., Mrs. Maloney was carefully and cautiously driving her motor-car westerly on King-street, between Ferguson-avenue and Walnut-street, in the city of Hamilton, when the defendants carelessly and negligently drove one of their cars into the rear of the plaintiffs' automobile, causing damage to the car and serious and permanent injuries to Mrs. Smith.

In opening his case to the Court and jury, Mr. O'Reilly's only statement as to the defendants' negligence was as follows:—

"The plaintiffs were driving on the right side of the road, at a moderate rate of speed, and the street-railway car came along and was about to pass, and when the car got past the front part of the automobile, the officers of the railway company opened the door on the side of the car and struck the plaintiffs' car in the rear, damaging the plaintiffs' car, and seriously shocking Mrs. Sarah Smith."

The opening of the street-car door by officers of the defendants, while Mrs. Maloney was driving past in her car, is thus stated to be the cause—the only negligent cause—of the damage to the motor-car, and of the injuries sustained by Mrs. Smith. What the jury found to be the defendants' negligence was quite different—"not using proper precaution in stopping the car."

Evidence is wanting to support this finding. Mrs. Maloney and her husband did not see the street-car until after the collision. They did not see the street-car door open until the automobile and car were stopped. They say they were struck from behind. Mrs. Maloney admits that the impact threw herself and her mother forward—an impossible result if the car in which they were riding

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was struck by the street-car following it. Upon the evidence for the plaintiffs the manifest cause of the accident was that Mrs. Maloney's automobile in coming out diagonally from the kerb ran against the left front corner of the street-car, and, breaking off the mechanism operating the step and the door, opened the door and then struck it. The automobile ran against the car door, not the car door against the automobile. In addition, the evidence on behalf of the defendants makes this abundantly clear.

No negligence such as was found is attributable to the defendants. The appeal must therefore be allowed with costs and the action dismissed with costs.

Appeal allowed.

[LOGIE, J.]

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REX v. DOMINION BANK.

Nov. 7.

Crown—Sales Tax—Right to Recover from Bank which has Realised Assets of Manufacturing Company Pledged to it—Collection of Tax by Company and Bank—Special War Revenue Act, 1915, 5 Geo. V. ch. 8, and Amending Act 12 & 13 Geo. V. ch. 47, sec. 17.

A company carrying on a manufacturing business, until about the 15th September, 1924, was liable to the Crown for sales tax under the Special War Revenue Act, 1915, 5 Geo. V. ch. 8, and amendments. The company was a customer of the defendant bank, and had entered into an agreement with the bank whereby the latter was given security for advances upon the assets of the company. On the 15th September, 1924, the bank entered into possession of the company's plant and visible assets and operated the plant, through the company's facilities and in its name for the purpose of completing and selling manufactured goods, until the 3rd December, 1924, when the company became bankrupt. On the 15th September, 1924, the company owed the Crown a large sum for sales tax; and during the period in which the bank operated the plant, it collected a sum of \$508.78 as sales tax from customers to whom goods were sold. The liquidation in bankruptcy proceeded, and on the 8th February, 1927, the Crown received from the trustee \$1,900, which was the full net amount of the estate other than the assets realised by the bank, and after payment of the expenses of liquidation. The Crown claimed from the bank for sales taxes \$3,865.51, which included the \$508.78:—

Held, that sec. 17 of 12 & 13 Geo. V. ch. 47, an Act amending the Special War Revenue Act of 1915, gives no lien on the property of the debtor, but only a right to payment in priority in the event of the debtor's insolvency, and no right of action in debt against the bank. The assets of the debtor over which the Crown has priority include only the equity remaining in the debtor and passing to the trustee in bankruptcy. Here there was no such equity, but a large loss to the bank on the realisation of the company's assets; and the Crown, having failed to take action against the debtor before the bank took possession, had no right of action against the bank even for sales tax collected as such by the company before the bank took possession.

Goodman and Attorney-General for Canada v. Bank of Toronto (1924),
56 O.L.R. 318, followed.

As to the indebtedness to the Crown in respect of sales made after the 15th September, 1924, it was held, that, as in entering into possession the bank was realising upon its security, it was not "a manufacturer or producer or importer or transferee or licensed wholesaler or jobber," who are the persons covered by the Act; and, the legislation being fiscal, the Crown must bring the subject within the letter of the law.

Held, also, that the sales tax was not intended to be imposed upon the person realising, by means of sale, property pledged to him to secure a debt—a going concern was in contemplation.

AN action brought in the name of his Majesty the King by the Minister of National Revenue to recover \$3,685.50 alleged to have been collected by the defendant bank from the customers of Langslow Ltd. and to be due to the Crown (Dominion of Canada) in respect of sales taxes.

November 5. The action was tried before LOGIE, J., without a jury, at Cobourg.

T. F. Hall, K.C., for the Crown.

H. W. Shapley, for the defendant bank.

November 7. LOGIE, J.:—Langslow Limited carried on a furniture manufacturing business at the town of Cobourg, operating under a licence issued by the Department of Customs and Excise, until about the 15th September, 1924, and as such manufacturer was liable to the plaintiff for sales tax under the Special War Revenue Act of 1915 and amendments thereto.

Prior to the company's becoming a customer of the defendant bank, it entered into an agreement dated the 19th February, 1921, agreeing that the bank might appoint an agent or receiver to act for the company, who should have all the powers granted to the bank and in addition the right from time to time, in the name of the customer, to exercise all rights, etc., of the customer and to do all acts and things that the customer could do for the purpose of completing, selling, shipping, or otherwise dealing with the goods in such manner as the bank might think proper to enable the goods to be realised upon. Another agreement in the same words was entered into by the company on the 31st July, 1923.

On or about the 15th day of September, 1924, the defendant, by virtue of its securities and to realise upon them, entered into possession of the manufacturing plant of the said company and took possession of the stock-in-trade, book-accounts, and all visible assets, and operated the said plant, through the company's facilities and in its name, for the purpose of completing and selling the goods, until the 3rd December, 1924.

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On that day Langslow Limited became bankrupt. On the 15th September, 1924, the company owed the plaintiff for sales tax under its licence a large sum of money, the details of which need not be considered in this judgment, as it was agreed that, in the event of the plaintiff being entitled to recover, a reference should be had as to this, and during the months of September, October, and November, 1924, while the defendant bank was, in the company's name, operating the plant of the company, the defendant collected a sum said to be \$508.78 *quâ* sales tax from customers to whom goods were sold. The liquidation in bankruptcy proceeded, and on the 8th February, 1927, the plaintiff received from one Clarkson, the trustee in bankruptcy of the company, the sum of \$1,900, which was the full net amount of the estate, other than the assets realised upon by the bank, arising after payment of costs and expenses in connection with the winding-up. There remains, it is alleged, the sum of \$3,865.51, which includes the sum of \$508.78 due to the Dominion Government, and this sum the plaintiff claims as a debt against the defendant bank.

Section 17* of 12 & 13 Geo. V. ch. 47, an Act amending the Special War Revenue Act of 1915, 5 Geo. V. ch. 8, was in force at the material times.

The case falls naturally into two branches: first, as to the indebtedness to the Crown for the sales tax upon sales made by the company prior to the 15th September, 1924; and, second, that which is alleged to have accrued subsequently.

Dealing with the first branch, the case is fully covered by *Goodman and Attorney-General for Canada v. Bank of Toronto* (1924), 56 O.L.R. 318, and in the Appellate Division (1925) 57 O.L.R. 109. The Act in question gives no lien on the then property of the debtor, but only a right to payment in priority in the event of the debtor's insolvency. The statute does not give any right of action in debt against the bank: *Rex v. Jack Pine Lumber Co.*, [1928] 4 D.L.R. 976.

It was held in *Re Horton* (1923), 4 C.B.R. 273, approved in *Rex v. Bank of Nova Scotia* (1925), 58 O.L.R. 255, that the assets of the debtor over which the Crown has priority for sales tax

* 17. Notwithstanding the provisions of the Bank Act and the Bankruptcy Act, or any other statute or law, the liability to the Crown of any person, firm or corporation, for payment of the excise taxes specified in the Special War Revenue Act, 1915, and amendments thereto, shall constitute a first charge on the assets of such person, firm or corporation, and shall rank for payment in priority to all other claims of whatsoever kind heretofore or hereafter arising save and except only the judicial costs, fees and lawful expenses of an assignee or other public officer charged with the administration or distribution of such assets.

conferred by the Special War Revenue Act amendment included only the equity remaining in the debtor passing to the trustee in bankruptcy. Here there was no such equity, but, instead, a large loss to the bank on the realisation of the company's goods, wares and merchandise, book-debts, etc.; and the Crown, having failed to take action against the debtor before the bank entered into possession of the debtor's property, has no right of action against the bank even for sales tax, collected *quâ* sales tax by the company prior to the entry into possession by the bank. Neither the bank nor the company was a trustee for the Crown in the collection of the sales tax from customers. It was the vendor, not the purchaser, who was liable to pay, and as regards the bank the payments of sales taxes were not ear-marked in any way, so far as the evidence shews, but were apparently paid in and checked out of the company's account in the same way as other company money.

Then, as to the second branch, when the bank entered into possession of the property of the company, that property having been assigned to the bank, it became to all intents and purposes, and subject only to payment over to the company of any surplus, the owner of the property in question. In entering into possession the bank was realising upon its security, and the short answer to a demand for sales tax upon the goods sold by the bank during this realisation is that the bank was not "a manufacturer or producer or importer or transferee or licensed wholesaler or jobber," etc., who are the persons covered by the Act in question. The legislation being fiscal legislation, the Crown must bring the subject within the letter of the law: *Partington v. Attorney-General* (1869), L.R. 4 H.L. 100, at p. 122; *Versailles Sweets Ltd. v. Attorney-General for Canada*, [1924] 3 D.L.R. 468, [1924] S.C.R. 466.

It is my opinion, moreover, that the Legislature never intended that a sales tax should be imposed upon the property of a third person, not coming within any of the above categories, who was realising, by means of sale, property pledged to him to secure a debt. It contemplated a going concern and reserved its priority, upon bankruptcy, in the assets.

It is true that the bank, through the company, improperly collected the sum of \$508.78 from customers, perhaps in ignorance of the law which had not then been settled *ex abundanti cautela*; but it was not, as I have said, the trustee for the Crown of this money—which is, I suppose, the money of the various customers who paid it, but who now may never think it worth while to attempt to recover it and would only be met with grave legal difficulties if an attempt was made.

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Action dismissed with costs.

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IMPERIAL BANK OF CANADA v. HEISZ.

IMPERIAL BANK OF CANADA v. HUNDT.

Promissory Notes—Whether Bank Holder in Due Course—Notice of Condition upon which Notes Endorsed—Knowledge of Local Bank-manager—Condition not Fulfilled—Pledge by Customer of Notes to Bank as Collateral Security for Advances—Absence of Good Faith—Admissibility of Extrinsic Evidence—Alteration in Date of Note—Materiality—“Apparent” Alteration—Onus—Bills of Exchange Act, secs. 56, 145, 146 (a).

Promissory notes for \$1,000 and \$2,000 were endorsed by the defendants respectively, for the accommodation of a company which was a customer of the plaintiff bank, pursuant to an arrangement made at a conference between the manager of the company, one of the defendants, and the local manager of the plaintiff bank, whereby the proceeds of the notes, when endorsed, were to be applied in reduction of a balance due by the company upon a purchase of land, and that the notes should not be used until the company had raised a sum of \$1,000 to make up the sum of \$4,000 to be paid upon the land-purchase. The defendants endorsed the notes upon these conditions. The notes were not discounted by the plaintiff bank, but were pledged to the bank by the company as collateral security for advances made to the company. The company never raised the \$1,000 necessary to complete the payment of \$4,000:—

Held, upon the evidence, that the local manager of the bank had full notice and knowledge of the arrangement, and when he accepted the notes as a pledge he was not acting in good faith, and the plaintiff bank was not a holder in due course, within the meaning of sec. 56 of the Bills of Exchange Act, R.S.C. 1927, ch. 16, the manager (who must be taken to have represented the bank) having had notice and knowledge of the defect in the title of the person who negotiated them.

The law places one who takes a note before maturity with notice of the equity or defect in title of the person who negotiated it in the same position as one who takes it when overdue.

MacArthur v. MacDowall (1893), 23 Can. S.C.R. 571, applied.

Held, also, that extrinsic evidence was admissible to shew that the notes were delivered subject to a condition which was never fulfilled—extrinsic evidence is always admissible to shew a delivery in escrow.

One of the notes, when delivered to the bank, bore the date “December 22nd,” but it was afterwards altered to “December 26th,” the alteration plainly appearing on the face of the note. There was no express assent by the endorser to the alteration:—

Held, that the alteration was a material one: sec. 146 (a) of the Act; and the note was voided: sec. 145.

The plaintiff bank had failed to satisfy the onus of shewing that the alteration was made in such circumstances as not to vitiate the note.

The alteration was apparent so as to bring it within the exception stated in sec. 145.

Cunnington v. Peterson (1898), 29 O.R. 346, followed.

ACTIONS upon promissory notes endorsed by the defendants.

The actions were (by consent) tried together, by WRIGHT, J., without a jury, at London.

J. G. Gillanders, for the plaintiffs.

David Robertson, K.C., for the defendant Heisz.

F. H. Curran, for the defendant Hundt.

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November 7. WRIGHT, J.:—Both actions are upon promissory notes endorsed by the defendants and held by the plaintiff under circumstances hereinafter set forth.

The Pure Meat Products Company Limited, carrying on business in London, Ontario, was a customer of the plaintiff bank. The company purchased property in London, upon which its business was carried on, from one Gustave Tiedi, under an agreement for purchase dated the 14th January, 1926. Some payments were made on account of the purchase-price, but a large amount remained due at the time when the notes sued on were given.

The manager of the company, one Arthur J. Tiedi, conceived the idea of reducing the amount remaining due under the agreement, and discussed the proposition with Allan J. Goodall, manager of the branch at London, where the company did its banking. It was thought by these two men that a reduction of the balance due on the property and the procuring of a deed would tend to improve the company's credit. With that object in view, A. J. Tiedi got into communication with the defendant Heisz, and on the 22nd December, 1927, these two went to the office of the Imperial Bank at London and discussed the proposition with the manager. The agreement was then gone over in detail in the presence of the manager, and it was finally arranged that the defendant Heisz would endorse a note for \$1,000 and an endeavour would be made to have the defendant Hundt endorse a note for \$2,000, and Tiedi would arrange that the company would pay another \$1,000 about the first of the year out of collections made from trade customers. It was the distinct understanding at this conference that the proceeds of the two notes when endorsed by the defendants should be applied towards the reduction of the balance due under the agreement and that the notes should not be used until the company had raised the other \$1,000 wherewith to make a payment in all of \$4,000 on the agreement for the purchase of the property. The defendant Heisz endorsed the note on that occasion upon the condition already mentioned. This note was signed by A. J. Tiedi as maker, and was for the sum of \$1,000, payable 6 months after date.

A note was also drawn at the same time to be signed by C. M. Hundt as maker and endorsed by the defendant Mary Ann Hundt.

Wright, J. It was arranged that C. M. Hundt, who was an employee of the
1929. company, should take the note to Formosa and procure his mother,
IMPERIAL the defendant Hundt, to endorse it. It was also arranged that
BANK OF the defendant Heisz should see Mrs. Hundt and explain the trans-
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Heisz testified that he explained the whole matter to Mrs. Hundt; that he told her that Arthur Tiedi wished to raise \$4,000 to pay on the agreement in order to procure a deed of the property.

The company, by A. J. Tiedi as manager, signed a general pledge of collaterals to the bank, purporting to be dated the 22nd December, 1927, and on the back of this pledge are now set forth particulars of the note endorsed by the defendant Heisz, but it was testified by Arthur J. Tiedi that he did not sign the pledge on the 22nd December, but at a later date, and he also says that the endorsement was not on the pledge when he signed it. Another pledge was produced, bearing date the 14th January, 1928, and on this pledge appears an endorsement specifying the note endorsed by the defendant Hundt.

The witness Arthur J. Tiedi testified that on the pledges signed by him these notes did not appear as endorsements; he also testified that the bank-manager, Goodall, told him that the bank was going to advance some \$4,000 on the company's note and hold the two notes endorsed by the defendants as collateral, and that he was waiting for a Mowet note to be brought in and left with the bank.

The evidence disclosed that nothing was done with these two notes until some time in January, but in the meantime Arthur J. Tiedi had inquired from time to time as to the discounting of these two notes or rather the advancing of moneys upon them, but he says that Goodall informed him several times that he would discount them the next day. There was also the evidence of Marie Brickner, the stenographer in the office of the Pure Meat Products Company, to the effect that she was sent with a message upon more than one occasion to the manager to inquire when the notes would be discounted, and she also received the answer that "it would be attended to to-morrow." Later on, the manager Goodall stated to Arthur J. Tiedi that it was too late to discount them, and there the matter rested.

When the notes fell due they were not paid, and after some correspondence these actions were brought.

When demand was made upon the defendant Heisz for payment of the note endorsed by him, he replied setting forth the arrangements made as to the application of the proceeds of the note and stating that it was to be used only for the purpose of paying on

the real estate agreement. To this letter the manager Goodall replied, but did not dispute the statement made by Heisz in his letter, merely stating that the Pure Meat Products Company Limited pledged the \$1,000 note as collateral for advances made to the company, and that any private arrangement or understanding with Mr. Tiedi did not affect the right of the bank to collect the note.

In his cross-examination at the trial, the manager admitted that the defendant Heisz stated at the time he endorsed the notes that he wanted the money represented by his note to be applied on the mortgage (meaning agreement) to Gustave Tiedi. He, however, stated that there was no mention about Heisz seeing the defendant Hundt in order to explain the transaction to her.

In preference to the latter statement, I accept the evidence of the defendant Heisz and Arthur J. Tiedi, and find as a fact that the arrangement as stated by them in regard to these two notes was made with the full knowledge and approval of Goodall and that he knew that Heisz endorsed the note on the distinct understanding that it was to be applied as already stated. I also find the facts to be that the manager knew and approved of the arrangement whereby the defendant Heisz should interview the defendant Hundt and explain to her the proposition outlined at the conference in the manager's office on the 22nd December. I find also that it was the intention of all parties to the arrangement that the notes in question should not be used in any way until the balance of the \$4,000 proposed to be paid to Gustave Tiedi on the agreement should be available for that purpose. This time never arrived, as at no time did the Pure Meat Products Company Limited raise the \$1,000 necessary to complete the payment of \$4,000.

Upon this state of facts the defendants contend that they are not liable to pay the notes, on the ground that the plaintiff bank is not a holder in due course within the definition of sec. 56 of the Bills of Exchange Act, inasmuch as at the time the notes were pledged to the plaintiffs the manager had notice and knowledge of the defect in the title of the person who negotiated them. In my view this defence must prevail. The manager Goodall knew of the arrangement between the parties as to the special use to which the proceeds of these notes should be applied, and when he took those notes as a pledge for the general balance due the bank by the Pure Meat Products Company he was not acting in good faith. In any event the circumstances surrounding the pledging of these notes invited inquiry so as to bring the facts within the principle of the decision in *Jones v. Gordon* (1877), 2 App. Cas. 616.

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An arrangement similar in some respects to the one in this case was considered by the Supreme Court of Canada in *MacArthur v. MacDowall* (1893), 23 Can. S.C.R. 571, where it was held that an agreement between the maker and payee of a promissory note that it should only be used for a particular purpose constituted an equity which, if the note was used in violation of that agreement, attached to it in the hands of a *bonâ fide* holder for value who took it after dishonour. (See particularly the judgment of Patterson, J., at pp. 595 and 596). In that case the note had been negotiated when it was overdue, but I conceive that the law places the holder in the same position if he took it before maturity with notice of the equity or defect in title of the person who negotiated it. In effect, clause (b) of sec. 56, already cited, provides that in order to constitute a holder in due course the bill of exchange or promissory note must be taken in good faith and without notice of any defect in the title of the person who negotiated it at the time the bill was negotiated to the holder.

In the present instance the manager of the bank, who must be taken for all purposes in connection with the dealings with these notes to represent the bank, had full notice and knowledge of the purpose for which the notes were given, and with that knowledge he deliberately took a pledge of the notes for an entirely different purpose. In these circumstances, it could not be said that he took the notes in good faith and without notice of defect in title. Here the arrangement between the parties was, as already stated, to use the notes for a particular purpose, and the Pure Meat Products Company Limited had no authority to use them otherwise.

On the argument, counsel laid great stress on the fact that the letters written by the defendant Heisz to the bank-manager referred to the arrangement as one between himself and Arthur J. Tiedi, and did not allege that the bank-manager had express notice of such arrangement. However, upon the evidence I have no hesitation in finding that the bank-manager had full notice of this arrangement, and that when he took the notes as a pledge from the Pure Meat Products Company he did not act in good faith.

I was somewhat troubled to decide whether or not extrinsic evidence was admissible to shew this arrangement, as it might possibly be said to vary or contradict the written instrument, but a consideration of the authorities has led me to the conclusion that such evidence is admissible to shew that the notes were delivered subject to a condition which was never fulfilled. In other words, the

notes were in the nature of an escrow, and, for the purpose of establishing that, extrinsic evidence is always admissible. See Byles on Bills, 17th ed., p. 122; Falconbridge on Banking and Bills of Exchange, 4th ed., p. 666 *et seq.*

The defendant Hundt set up an additional defence. Counsel for this defendant contends that at the time the note was executed it bore date the 22nd December, 1927, and by referring to the note itself that would appear to be the case. The date was altered, and now reads "December 26th," but a very casual inspection would disclose the fact that it originally read "December 22nd." There is the evidence of Arthur J. Tiedi that the note was originally dated the 22nd and that it bore that date when delivered by him to the bank. This is strenuously denied by the bank-manager, but, while in some particulars the evidence of Tiedi is not satisfactory, yet I accept his evidence on this point and find that when the note was delivered to the bank it bore the date "December 22nd, 1927." There is no satisfactory evidence as to how or by whom the alteration was made. This alteration is, by virtue of the provisions of sec. 146 (a) of the Bills of Exchange Act, a material alteration; and there was no express assent by the defendant Hundt to the alteration. It follows that, by virtue of the provisions of sec. 145 of the Bills of Exchange Act, the note is voided, and upon that ground alone the defendant Hundt would be entitled to succeed.

It may be mentioned here that the note was not protested until the 29th June, 1928, which would not be in time if the original date of "December 22nd" was the true date. But it is not needful for me to base my decision upon that point. The defence of alteration was not set up by the defendant Hundt in her pleading, but the evidence was given at the trial without objection.

The bank-manager was cross-examined as to the alteration and said that in his opinion if he had looked or it had been drawn to his attention he would have seen at once that it had been altered.

In Byles on Bills, 17th ed., p. 309, and Chalmers on Bills, 9th ed., p. 257, the law is stated to be as follows: "Where a bill appears on its face to have been altered the onus is on the party seeking to enforce it to shew that the alteration was made in such circumstances as not to vitiate the bill." Here the plaintiff bank has failed to satisfy that onus.

There may be some doubt as to whether the alteration is apparent so as to bring it within the exception stated in sec. 145 of the Bills of Exchange Act, but I think the decision in *Cunnington v. Peterson* (1898), 29 O.R. 346, supports the view that it is apparent.

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It follows from the foregoing that the actions must be dismissed—in the case against the defendant Heisz with costs.

As the defendant Hundt did not plead one of the grounds of defence upon which she succeeded, I allow her only one-half of her costs of defence.

[APPELLATE DIVISION.]

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Nov. 8.

WILSON v. REBOTRY.

Negligence—Motor-vehicles upon Highway—Injury to Plaintiff by Defendant's Automobile—Plaintiff Alighting from Motor-bus and Crossing Highway behind it—Findings of Jury—Consideration by Appellate Court—Findings Set aside and Action Dismissed—Duty of Driver of Automobile.

The Court will not interfere with the findings of fact of a jury if they are such as could be made by honest and reasonable men; and in the consideration of an appeal the evidence is to be carefully scrutinised to see whether the jury were justified by the evidence in the determinations to which they came.

The infant plaintiff (a girl) was a passenger in a motor-bus proceeding south upon a highway. Her home was on the east side of the highway. The vehicle was stopped opposite to a small house on the west side, about opposite to her home, to allow her to alight. She did alight and took two or three steps toward the west, perhaps to get quite clear of the bus, but giving the appearance of walking toward the small house. Then she turned north and ran around the back of the bus upon the highway, going toward her home. She looked to the left, but not to the right, before running out on the road. The defendant was driving an automobile north upon the east side of the road, and the girl ran into the automobile and was injured. The jury, at the trial of an action to recover damages for her injuries, found negligence on the part of both parties, but 60 per cent. of it on the part of the defendant; and judgment was entered accordingly:—

Held, upon appeal, that the defendant was not bound to anticipate that the girl would run into the road in front of her so as not to give the defendant a chance to stop; the defendant could not be expected to know the actual intention of any one on the road, but only the intention manifested by outward acts or to be expected from the ordinary course of events; the sole negligence causing the accident was that of the girl herself; and the findings of the jury were disregarded and the action dismissed (MASTEN and FISHER, JJ.A., dissenting).

AN appeal by the defendant from the judgment of McEvoy, J., at the trial, upon the findings of a jury, awarding the plaintiffs damages in an action for injury sustained by the infant plaintiff, when knocked down by the defendant's automobile upon a highway, and damage and loss sustained by the adult plaintiff in consequence

thereof. The infant plaintiff was struck after alighting from a motor-bus, and the plaintiffs alleged negligence on the part of the defendants. The jury found that the infant plaintiff and the defendant were both guilty of negligence and apportioned 60 per cent. of the blame to the defendant and 40 per cent. to the infant plaintiff. The trial Judge directed judgment to be entered accordingly.

October 8, The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

R. S. Colter, K.C., for the appellant, argued that the infant plaintiff's negligence was the sole cause of the accident, because she ran across the road without first looking to her right. The appellant was not guilty of any negligence, and the jury were not justified in finding her guilty. The appellant could not anticipate that the infant plaintiff was going to cross the street: *Seiden v. Pinkerton* (1926), 31 O.W.N. 325; *Biehn v. Hands* (1922), 22 O.W.N. 35.

J. P. O'Reilly, for the plaintiffs, respondents, contended that the finding of the jury that the appellant was negligent was amply justified by the evidence, and should not be disturbed unless the Court should come to the conclusion that there was no evidence at all to support the finding, which conclusion could not be reached in this case. The appellant was negligent in assuming that the infant was intending to go into the house opposite the Wilson house, and in not having her car under such control that in the event of the infant proceeding (as she did) across the street, she (the appellant) could have avoided hitting the infant.

November 8. RIDDELL, J.A.:—This case was tried by a jury at a recent sittings of the trial court and resulted in the jury finding that in the accident in question the defendant, driving an automobile, was 60 and the girl struck by it was 40 per cent. guilty of the negligences causing the accident. The defendant appeals, contending that the sole negligence causing the accident was that of the girl herself.

In the case of *Maloney v. Hamilton Street Railway Co.* (1929), *ante* 444, recently decided in this Court, the principles to be applied in the consideration of the findings of fact of a jury are stated; and no good purpose can be attained by re-stating them here—suffice to say, we do not interfere if the findings are such as could be made by honest and reasonable men; and in the consideration of an appeal the evidence is to be carefully scrutinised to see whether

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1929. the jury were justified by the evidence in the determinations they came to.

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v.
REBOTY.

Riddell, J.A.

The facts of this case are little in dispute:—

The plaintiff Marguerite Wilson is a young girl of 17, who was at the time of the accident attending school in Hamilton; she took passage on a 'bus which passed her home, the 'bus proceeding south. Her home was on the east side of the road, somewhat retired from the highway; and about opposite to it was a small house, quite near to the road. The 'bus stopped opposite the small house on the west side to allow the plaintiff to alight. She did alight and took two or three steps toward the west, perhaps to get quite clear of the 'bus, but giving the appearance of walking toward the small house. Then she turned north, and ran around the back of the 'bus upon the highway, going toward her home further east. She looked to the left, but omitted to look to the right before running out on the road. The defendant was driving an automobile north upon the east side of the road and was run into by the plaintiff with somewhat serious results—hence this action.

As has been so often said, the duty cast upon any one in charge of such a machine as the defendant was driving depends upon the circumstances of which he was or should have been aware, and upon what he expects or should expect; he is not held to be a mind-reader so as to know the actual intention of any one on the road, but only the intention that is manifested by outward acts or to be expected from the ordinary course of events.

Under the circumstances of this case, I am wholly unable to see how the defendant is to be held as bound to anticipate that the plaintiff would or might run into the road in front of her so as not to give the defendant a chance to stop. It is not wholly without significance that it is reasonably clear that the plaintiff ran into the defendant, not *vice versa*.

I would allow the appeal and dismiss the action with costs here and below.

LATCHFORD, C.J., and ORDE, J.A., agreed with RIDDELL, J.A.

FISHER, J.A.:—This action was tried before Mr. Justice McEvoy and a jury. The jury found both parties negligent, and from the judgment entered the defendant appeals.

To understand and determine the appeal, it is necessary to state the following facts. The accident occurred in broad day-light on the 26th June, 1929, on a cement highway, 20 feet in width,

leading from Hamilton to the village of Caledonia. The girl plaintiff was a passenger in a 'bus proceeding southerly, and the defendant was driving her car in a northerly direction, meeting the 'bus. The 'bus stopped on the west side of the highway close to the grass, and the girl plaintiff alighted from the door at the front of the 'bus upon the grass and 2 or 3 feet from the bus.

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Fisher, J.A.

At the trial, the plaintiff was asked what then happened, and her answer is:—

"A. I got out of the 'bus and walked along the side of the grass while the 'bus went on its way. I looked to the left of the road and walked across to the centre of the road."

"Q. How long was the 'bus stopped? A. Just long enough to let me out, and it started right up."

The defendant's story is:—

"I was driving about 20 miles an hour, I would judge, on the right side of the road, and I was going slowly. The 'bus came along and when I saw the 'bus coming I slowed up. The 'bus stopped in front of a small house, and some one got off, and I immediately looked back at the road, thinking that whoever was getting off would go into the house. Just then the 'bus pulled up and a girl ran from behind the 'bus directly across the road into the side of my front fender. I stopped the car as soon as I could, but of course she had been knocked down."

The 'bus driver swore to the following:—

"Q. What was the length of this 'bus? A. It is 26 feet long.

"Q. And what is the width of it? A. About 8 feet, between 7 and 8 feet.

"Q. What about a car approaching? If your 'bus is going towards Hamilton and a car is approaching your 'bus coming from Hamilton, could the driver see a person passing around your 'bus or not? A. Not very well. No. It is a high 'bus, the one I had."

There was the usual conflicting evidence such as is to be found in nearly all automobile accident cases, and unnecessary to refer to except in regard to one matter, viz., that the plaintiff swore she was not running, and the defendant swore that she was running, at the time the plaintiff was proceeding to cross the highway and the accident happened.

It was argued by learned counsel for the appellant that the plaintiff's negligence was the sole cause of the accident, in that she proceeded to cross the highway without first having a clear view of what might be coming from her right, and that the jury were wrong in finding that the defendant was guilty of any negligence.

App. Div. The sole question therefore for determination on this appeal is
1929. whether or not the defendant was guilty of any negligence.

WILSON If the highway was only 20 feet in width, and the 'bus about
v. 8 feet wide, and if travelling a short distance from the westerly
REBOTOV. limit of the cement road, there would only remain about 10 feet
Fisher, J.A. for travelling on the east side of the 'bus; and, as an automobile
itself takes up a space of about 6 feet, it would necessarily follow
that there would be little margin left between an automobile and
the 'bus when passing, so that, as the trial Judge pointed out to
the jury, it would be "next to impossible for her to see whether
there was anybody coming from the other direction;" and this, it
will be seen, agrees with the evidence of the 'bus-driver.

In approaching a consideration of the question raised by this appeal it is to be borne in mind that, the jury having found that the defendant was negligent, a reversal of that finding is a reversal of their finding of fact, which can be done only if there was absolutely no evidence on which an honest jury of reasonable men could base their finding, and the only principle of law involved is, that it was the duty of the defendant towards the infant plaintiff to exercise such care as the circumstances demanded. What the circumstances were and what degree of care those circumstances called for were questions of fact of which the jury were the sole and exclusive judges.

What, then, as a matter of fact, on the evidence, were the relative duties of, and the care to be exercised by, the girl plaintiff and by the defendant respectively in the circumstances here described? On the part of the plaintiff it was her duty to look to the right and to the left to see if any one was approaching before proceeding; and on the part of the defendant, in approaching a 'bus stopped to discharge a passenger, to have either stopped her car until the view was clear and she could see what the discharged passenger was going to do, or to have reduced her speed to such a limit that she could have stopped instantly if the discharged passenger attempted to cross to the right and in her path. It seems to me useless to argue that the defendant was justified in concluding that, because the plaintiff alighted on the grass opposite to a house on the west side where the 'bus stopped and took two or three steps in that direction, the plaintiff lived in that house and was going to enter. What right had the defendant so to conclude, when it is admitted that she did not know the plaintiff or where the plaintiff lived? As the learned Judge pointed out in his charge to the jury, an explanation for the plaintiff proceeding 2 or 3 feet on the grass in the direction of the house might well be that she should "walk

far enough away from the 'bus so as not to be struck by any part of it when it started on."

In this connection it is well, I think, to refer to the language used by the trial Judge when instructing the jury:—

"Did the young woman do anything that would warrant a reasonably prudent person in assuming that the person who got off the 'bus was to go into the house opposite the Wilson house? That is a matter of judgment for you as 12 men of the world who think and know how people act and ought to act, and how a reasonably prudent person ought to act.

"It was the duty of Mrs. Rebotoy to do all that a reasonably prudent person would do who saw some one get off that 'bus. Did the girl do anything that gave anybody any right to assume that she was going into this other house, or was it her duty when she started to drive past that 'bus knowing that some one had got off there, to have her car under reasonable control? To have her eyes open and to be in a position to see whether some one was coming around the end of the 'bus or not, and take precaution not to hit that person if he or she came around, even if that person was not as careful as that person ought to be coming around."

No one doubts the correctness of the decisions in *Biehn v. Hands*, 22 O.W.N. 35, and *Seiden v. Pinkerton*, 31 O. W. N. 325, that it is the plaintiff's own negligence if he steps or darts from a kerb unexpectedly in front of a motor-car so that the driver has no chance to avoid him. This is not a case of imposing on the defendant the obligation of being a mind-reader, as my learned brother Riddell (whose judgment I have had the advantage of reading) seems to think. It is rather the case of a motorist and a pedestrian approaching a place of common danger, to the knowledge of both, and not fully realising their individual responsibility.

In my opinion the degree of care imposed upon the defendant, who was in charge of a dangerous and fast-moving machine, and approaching a 'bus which had stopped to discharge passengers, was greater than the degree of care imposed upon the plaintiff, a pedestrian; and the jury must have had this in mind when they came to the conclusion that both were negligent.

Is this Court to assume that the jury, which had been carefully and fairly charged by the trial Judge, ignored the Judge's instructions and directions and did not take into consideration the conduct of the defendant when she saw the 'bus stop to discharge a passenger, and that that passenger might attempt to cross to the east in the path of her car, and that unless the defendant stopped until her view was clear, or had reduced her speed to such an

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App. Div. extent as to enable her to have stopped in a moment's time, the
1929. defendant was not also guilty of negligence?

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The facts in this case convince me, as I think they did the jury, that the defendant "could not wait," or at all events did not wait, until she was sure that the plaintiff would do or was likely to do after she alighted from the 'bus. This Court should not assume that the jury, which had all the witnesses under observation and which had been carefully and fairly charged by the trial Judge, ignored the Judge's instructions and directions; and, to my mind, it would be highly improper for an appellate court to overthrow the findings of a jury on a question of fact, when there is, in my view at least, ample evidence on which the findings could be reasonably based.

The appeal should therefore be dismissed with costs.

MASTEN, J. A., agreed with FISHER, J.A.

Appeal allowed (MASTEN and FISHER, JJ.A., dissenting).

[APPELLATE DIVISION.]

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SMITH v. LOVERIDGE.

Aug. 21.
Nov. 8.

Contract—Purchase of Land for Resale—Fraudulent Misrepresentation as to Option-price—Agreement to Share Profits—Withdrawal of Co-adventurers in Ignorance of Rights—Right to Share in Profits actually Made.

The defendant, having an option from W. to purchase a parcel of land at the price of \$48,500, under a document dated the 14th January, 1927, represented to the two plaintiffs that the price to be paid was \$60,000, and induced them to become his co-adventurers in a project to buy the property and resell it at a profit; the defendant and the plaintiffs were each to have a third interest in the property. The option having expired on the 15th February, the defendant, without the knowledge of the plaintiffs, obtained a new option at the price of \$50,000; and on the 18th February a document dated the 14th February was signed by the defendant and the plaintiffs, purporting to be an agreement by the three to purchase the property from the defendant at \$60,000. The plaintiffs signed in the belief that the defendant's option was at the price of \$60,000. The plaintiffs each paid the defendant \$1,000, being their proportionate parts of the sum of \$3,000 said by the defendant to be necessary to "swing the proposition." It was not denied that the plaintiffs were entitled to the benefit with the defendant of his new option. On the 14th March the defendant took from W. an agreement for the purchase of the property for the alleged consideration of \$48,000. \$8,500 being already paid, and the balance payable in instalments; and on the 17th March he gave an option to sell the property to one R. for \$68,000. Further sums being payable to the defendant by the plaintiffs under their agreement with him, the plaintiffs found themselves unable to pay and asked the defendant to "let them out of this deal." This was on the 17th March. The defendant acceded to their request and returned their \$2,000. The plaintiffs did not know of the option given to R.:—

Held, that the plaintiffs were entitled to share in the profit made by the defendant upon the sale to R. which ultimately took place. The defendant's conduct in representing that his option was at the price of \$60,000 was fraudulent; and the plaintiffs, having withdrawn from the adventure in ignorance of the sale to R., which should have been revealed to them, had not lost their right to participate.

ACTIONS by two plaintiffs against the same defendant to recover from him the amount of a secret profit which, as the plaintiffs alleged, he made out of a joint adventure in which all three were at one time engaged.

November 7, 1928. The actions were tried together at Sandwich before McEvoy, J., without a jury.

W. P. Harvie and H. L. Barnes, for the plaintiffs.

J. H. Rodd, K.C., and R. H. Wilson, for the defendant.

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August 21. **McEVoy, J.**—At the request or consent of all parties the evidence in both cases was taken at the same time. The claim of each of the plaintiffs against the same defendant is to recover from the defendant a secret profit which they each assert that he made out of a joint adventure in which the three were, admittedly, at one time engaged. There is now no substantial dispute about the earlier steps of the transaction.

On the 14th January, 1927, the defendant entered into an agreement with Mrs. Bernard A. White, of Detroit, whereby she, for the sum of \$100, gave the defendant in writing an option, irrevocable for a certain time, to purchase lots Nos. 1 and 2 on the south-east corner of Victoria-street, in the city of Windsor, according to plan No. 81. By this agreement the price of the lots was to be \$48,500, payable \$10,000 on the 15th February, 1927, at the time of the acceptance of the option, and the balance \$5,000 annually on the 14th days of February, with interest on unpaid balances at the rate of 7 per cent. per annum, payable half-yearly. The whole of the principal was to be paid within 5 years. The option was to be open for acceptance up to noon on the 15th February, 1927, and not after, and might be accepted by letter containing a cheque for \$9,900 accepted by some chartered bank in Windsor. Time was to be of the essence of the agreement, and it was to be binding upon heirs and assigns.

On the 15th February, the defendant wanted an extension, and obtained it apparently at a slight advance in price by paying \$900; and one or other of these agreements was in force and virtue when the defendant approached the plaintiffs to go into a joint adventure.

The defendant represented to the plaintiffs that he could buy the two lots mentioned for \$60,000 if he could secure two persons to go into the matter with him for a third interest each. He told them it would require \$15,000 to "swing" it—\$3,000 cash; the balance of the \$15,000 would probably not be needed, as he expected quick action.

In the end the plaintiffs accepted his proposition upon these representations, and Grosch gave his cheque, exhibit 2, for \$1,000 (marked paid on the 18th February, 1927) to J. R. C. Struthers, an agent of the defendant; Smith also gave a cheque for \$1,000, and an agreement was signed by Grosch, Smith, and Loveridge, by the terms of which Grosch and Smith and Loveridge agreed with Loveridge, as vendor, to purchase the two lots, through Struthers, for \$60,000, payable as follows:—

"Two thousand dollars cash to the agent on this date as a

deposit, and covenant, promise, and agree to pay balance on or before March 15th, 1927, \$13,000.

"Yearly payments \$5,000 each with interest at 7 per cent. payable half-yearly, all to be paid in 5 years

"This offer to be accepted by the 15th February, 1927, otherwise void, and sale to be completed on or before the 15th day of March, 1927."

This is signed by Grosch, Smith, and Loveridge and witnessed by Struthers, and under is written an acceptance dated the 14th February, 1927, signed by Loveridge and witnessed by Violet Chambers. This rather unusual document was drafted by Loveridge.

There is another agreement filed, dated the 15th February, 1927, and signed by Grosch and Smith. This agreement purports to be a sale agreement of a two-thirds undivided interest in these lands, from Loveridge to Smith and Grosch, at "the price of \$40,000, payable in the manner and on the days and times hereinafter mentioned that is to say: \$10,000 of the said purchase-money has already been paid, the receipt whereof is hereby by the party of the first part acknowledged; a further part of the said purchase-money shall become due and payable in four equal consecutive annual payments of \$3,334 each, on the 15th days of February in each of the years 1928, 1929, 1930, and 1931; the balance of the said purchase-money, namely \$16,664, shall become due and payable on the 15th day of February, 1932," with a proviso as to interest.

There is considerable dispute about the framing and use made of this document.

I find the facts in reference to this to be that on the 10th March, 1927, Loveridge went to Stratford and had this document with him. He had an interview with the plaintiff Smith, who told him that he was not in a position to pay the \$4,000 that was falling due on the 15th March. They discussed the question of whether or not Loveridge could use Smith's note for the amount. Smith gave his note for \$4,000, and Loveridge told Smith that he would see what he could do with the note at his banker's. Loveridge took the note to his banker and instructed him to ascertain whether it would be proper to put the note through as a discount in Loveridge's account; that is, would the banker be satisfied with Smith's note? Before an answer was had from the banker, Loveridge had had an interview with Grosch; Grosch had been apparently in the same transaction in Toronto in which Dr. Smith had been engaged; and he too found himself unable to pay the \$4,000 falling due under the agreement on the 15th

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McEvoy, J. March. It was arranged by Loveridge and Grosch that Loveridge would draw on Grosch for the \$4,000, the balance of Grosch's share of the purchase-money, and a sight draft, dated the 14th March, 1927, was passed through the bank. Grosch did not accept the draft on presentation.

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When Dr. Smith's note fell due, he called up Loveridge on the telephone and told him that he would not be able to take care of his portion of the purchase-money at the due date of the note, and Loveridge treated favourably his proposal that Smith be allowed to withdraw from the transaction, his note to be cancelled, and if possible his down-payment of \$1,000 returned. At this telephone conversation Smith agreed to put his position in writing, and on the 16th March he sent a telegram (night-letter) in which he asked to be released, to have his note cancelled, and, if possible, to have his deposit returned.

At the time when Loveridge was at Stratford, the 10th March, the agreement dated the 15th February was given to Dr. Smith and left with him, but it had not been signed by Loveridge. Grosch and Smith signed this agreement on the 10th or 11th March, although the agreement is dated the 15th February. Loveridge says that it was intended to be a formal document to take the place of the rather unusual, in form, document of the same date, and one copy was left with Dr. Smith.

An agreement dated the 14th March, 1927, between Mrs. White and Loveridge, is filed. Under this agreement White agrees to sell to Loveridge the two lots for \$48,500, payable in manner and times mentioned, that is to say: "Eight thousand five hundred dollars of the said purchase-money has already been paid, the receipt whereof is hereby by the party of the first part acknowledged;" and Loveridge's cheque dated the 15th March, 1927, for \$7,360, marked "accepted" at the Imperial Bank, apparently on the 16th March, 1927—the date is blurred—is filed. And on the 14th March, 1927, Loveridge, through the Imperial Bank, passes a sight draft on Grosch for \$4,000.

On the 16th March, 1927, Smith telegraphs Loveridge: "Owing to financial disappointments . . . much regret cannot raise money *re* Victoria-street lot. Please release me of this obligation and cancel note given to you. Would be grateful if you would return payment made."

On the 17th May, Loveridge entered into an agreement with Thomas C. Ray to give Ray for \$500 cash an option to sell him the lots on or before the 31st March for \$68,000. The option was exercised by Ray within the time provided by the agreement, on the 28th March, 1927.

On the 16th March, 1927, Grosch writes to Loveridge: "Much as I regret it, as a friend could you let me out of this deal?"

On the 26th March, 1927, Loveridge writes to Grosch: "In reply to your letter of March 17th, I am enclosing cheque given Struthers" (i.e. by Grosch). "I am sorry to hear of your decision in this matter. The doctor explained what had happened."

On the 28th or 29th March that "enclosed cheque" finds itself deposited in Grosch's bank, the branch at Stratford of the Bank of Nova Scotia.

At the close of the evidence and after argument I found certain facts as follows:—

"In this case I am satisfied by the evidence that Loveridge, at the time he agreed to allow Smith to withdraw from the transaction and to repay him the money, had no inkling of the transaction which finally ripened into the sale for the amount of \$68,000.

"I am not able to find that the real reason why Smith and his co-adventurer Grosch did not pay the money was the failure of the defendant to leave a copy of the agreement with them or to send it to them.

"And I am quite as unable to find that the reason why the defendant did not send the agreement to them was that if he did so he would be giving a receipt for \$8,000 more than he had received.

"I am not impressed with that story any more than I am with the story of the plaintiffs that the reason they did not pay the money was that they did not have a copy of the agreement.

"The only ground upon which I could give a judgment for the plaintiffs would be that from the time the plaintiffs—and I put them both in the same class, I do not think there is any difference between them, they were working together, they were co-adventurers, they were co-operating with each other, and I think each knew pretty well what the other was doing at all times—entered into this agreement, the defendant was under a duty to reveal to the plaintiffs any prospect or opportunity of which he had any knowledge, before he would permit them to withdraw. I go that far.

"I find, upon the evidence, that the defendant had no prospect of sale to reveal at the time the withdrawal was agreed upon.

"The other point in the case is, and upon the evidence I find, that what Loveridge agreed upon with Grosch and Dr. Smith was that he had an opportunity to buy, from a Mrs. White in Detroit, the property at \$60,000, and at that very moment Loveridge had in his pocket an option to buy that property at \$48,500. I am

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in doubt at the moment as to what I ought to do on that finding. The evidence leaves no doubt in my mind upon that point; the defendant did represent to the plaintiffs that he could buy, if he could get somebody to join with him, that property for \$60,000, and he did, at that time, have in his possession an option on the property at \$48,500, but the whole matter had not yet ripened into a profitable transaction, nor is there any evidence that a profitable transaction was, at that moment, in sight.

"The plaintiffs saw fit to ask to be allowed to withdraw, and they were allowed to withdraw, and did withdraw. Now I am taking time to consider the legal situation as to that. If that raises any equity which could redound to the benefit of the plaintiffs, I may be able to give them some relief. That is the only point upon which I reserve."

Loveridge did not buy for the plaintiffs the option to purchase. He had already bought that and paid for it before he knew the plaintiffs. He did, however, represent to the plaintiffs that he could with his partners buy this property for \$60,000. He was in a fiduciary relationship with the plaintiffs at that time. It was his duty before he took the money of the plaintiffs to have disclosed that he could buy this property for \$48,500. This he did not do, and if the transaction had been completed he would have become liable to disgorge any secret profit he might make by that deceit. But when the plaintiffs failed to complete the transaction, can they recover the difference between what they agreed with Loveridge to pay for the property and what the property really cost Loveridge, the defendant? And, if so, is this upon the ground that they might have completed the transaction had they known that the true purchase-price was \$48,500, instead of \$60,000? And are they or is either of them entitled to recover any part of the profit arising out of the sale of the property for \$8,000 more than the proposed purchase-price of \$60,000?

My opinion is that, when Smith and Grosch failed to provide their share of the purchase-money at the date when it was required and asked to be relieved and to be let out of the transaction, and Loveridge agreed to let them out and himself provided the actual money to go on with the transaction that was gone on with, Smith and Grosch lost their interests in the transaction.

I therefore dismiss each action with costs except the costs of the trial. Each of the plaintiffs will pay the defendant half of the taxed costs of the trial.

The plaintiffs appealed from the judgment of McEvoy, J.

October 21. The appeal was heard by LATCHFORD, C.J., RIDDEL, MASTEN, ORDE, and FISHER, J.J.A.

W. P. Harvie, for the appellants, argued that Grosch, Smith, and Loveridge were partners in a joint venture, that Loveridge made a secret profit from the joint venture by fraudulently withholding information from his partners, and that the partners Smith and Grosch were entitled to make Loveridge account for these secret profits, of which Smith and Grosch should each receive one-third share. In the circumstances the defendant was a trustee for his partners for their share of all profits: *Sutton v. Forst* (1924), 55 O.L.R. 281; *Perens v. Johnson* (1857), 3 Sm. & G. 419; Lindley on Partnership, 9th ed., p. 602; *Bentley v. Nasmith* (1912), 46 Can. S.C.R. 477; Halsbury's Laws of England, vol. 22, p. 70. If either of the plaintiffs agreed to withdraw from the partnership, which was not admitted, he did so without full knowledge of the circumstances, and would not have done so if this knowledge had not been fraudulently withheld from him by the defendant, and so any agreement to withdraw was null and void. As to time being of the essence of the agreement between the partners, the defendant had waived his rights under this clause.

D. L. McCarthy, K.C., for the defendant, respondent, contended that both the plaintiffs voluntarily withdrew from their association with the defendant, and so were not entitled to any share of the profits. In any event, time was of the essence of the mutual agreement between the three co-adventurers, and on the 15th March, the date of expiry of the option to purchase, both plaintiffs were in default, and had no further rights; and there had been no waiver on the part of the defendant. In these circumstances, the defendant was not a trustee for the plaintiffs or either of them: Lindley on Partnership, 9th ed., p. 389 *et seq.*

November 8. LATCHFORD, C.J.:—These appeals are from the judgment of McEvoy, J., of the 21st August, 1929, dismissing both actions, which were tried together by consent and without a jury at Sandwich on the 7th November, 1928.

The material evidence is almost wholly documentary, leaving little dispute possible as to matters of fact.

Loveridge is, or was early in 1927, a real estate agent or operator—a “realtor”—according to the only document mentioning his “addition.” He carried on business in Windsor, and had an agent named Struthers at Stratford.

On the 14th January, 1927, for a cash consideration of \$100, he obtained from Mrs. Maud White, of Detroit, an option to pur-

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chase for \$48,500 two lots which she owned in Victoria-street, Windsor. A few days afterward, Struthers introduced to him the plaintiff Grosch, a manufacturer from Stratford, who happened to be in Windsor with his friend Smith, a physician, who also resided at Stratford. Loveridge urged Grosch and Dr. Smith to become interested in the White property. Loveridge represented to both that the first cost was \$60,000. Only a comparatively small amount he said would be necessary to "swing" the transaction, \$15,000—but \$5,000 each, if three were in the deal; and, as real estate was very active in Windsor, the lots could probably be sold at a profit before it became necessary to pay more than \$15,000 on account of the purchase-money.

Nothing effective resulted while the plaintiffs were at Windsor.

By the 10th February, the defendant had been unable to sell the property. The date of expiry of the option, the 15th, was drawing nigh, and time was of the essence of the contract. He went to Stratford on the 10th with a document headed "Offer to Purchase," and, assisted by Struthers, interviewed the plaintiffs. Their statements of Loveridge's representations are in accord, and are not attempted to be contradicted by the defendant, who gave evidence at the trial. Struthers, who was present at the interviews, was not called.

By such false representations as are mentioned by the learned trial Judge, the signatures of the plaintiffs were procured to a proposal by which they offered to buy the White property from Loveridge, "through Struthers," for \$60,000; \$2,000 was to be paid by them "to the said agent" on this date "as a deposit, balance on or before March 15th, 1927, \$13,000"—it is not stated to whom. Whether Loveridge signed as purchaser at the same time does not clearly appear.

The offer, which was executed in duplicate by the plaintiffs, is not dated; but at the time it was signed each of the plaintiffs gave Struthers a cheque for \$1,000—that of Dr. Smith dated the 10th February, and Grosch's post-dated the 18th February.

The defendant took both parts of the offer with him to Windsor, stating that it was "of no use" until registered. It was not registered. It was of course merely a proposal until accepted by Loveridge. His acceptance bears as date "February 14," three days after his return home. Under the same expressed date, he signed an agreement to pay Struthers a commission of one and a quarter per cent. "on the sale of my property (total of \$900)." This is obviously on the sale by himself to the plaintiffs and himself of the White lots for \$60,000. It was doubtless insisted on

by Struthers as compensation for his assistance in bringing about the transaction between the plaintiffs and his principal.

The original option expiring on the 15th February, the defendant on that date procured a new option from Mrs. White at an advance of \$500, making the new price \$50,000. Of this \$2,500 was payable on the date of the option; \$7,500 was to be paid on exercise of the right to purchase; and the balance with interest at stated periods. The option expired on the 15th March and, as in the case of the first option, time was of the essence of the contract.

Loveridge paid the deposit, four-fifths of which was money received from the plaintiffs. By the acceptance of their offer to purchase, they became bound to pay at least \$8,000 on or before the 15th March. What they actually agreed to pay was \$13,000; but \$5,000 of this was expected to be paid by their partner.

On the 10th March, Loveridge went to Stratford. It is not, I think, open to doubt that he had then decided to exercise the option if he could secure from the plaintiffs means to "swing" it. He had with him for submission to Grosch and Smith the agreement of purchase and sale, filed as exhibit 4. It is dated back to the 15th February, and was intended by the defendant, he states, to be substituted for the original document of that date. Grosch and Smith were to buy from the defendant and he was to sell to them an undivided two-thirds interest in the property. He secured their signatures to the agreement, but did not sign it himself. He, however, obtained from Smith a note at 10 days for \$4,000 and from Grosch a promise to accept a sight draft for the same amount, and returned with the agreement to Windsor. There he deposited the Smith note with his banker, without, he says, endorsing it; and on the 14th passed on Grosch a draft for \$4,000, which, on presentation next day at Stratford, was not accepted. The recital in the agreement that \$10,000 of the "purchase-money has already been paid" regards as such payment the \$2,000 originally paid to Struthers and the \$8,000 which the plaintiffs agreed to pay by note and draft.

The most striking difference between the two documents is that, while under the first the three men are co-partners as purchasers of an entire interest from Loveridge, under the second only Grosch and Smith are purchasers. Loveridge ceases to be their partner in a common enterprise and becomes a vendor to them. He may also have intended that by the new agreement he was avoiding liability to Struthers for the commission of \$900. However this may be, he was careful to ensure under both documents that he should be paid \$40,000 by the plaintiffs and that

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they should provide him with means to take up the option expiring on the 15th March.

Loveridge's agreement with Mrs. White for the purchase and sale of the property is dated the 14th March. He had succeeded in obtaining a reduction of \$500 from the option-price, and the consideration is \$48,500 instead of \$50,000; \$8,500 of the purchase-money is acknowledged to have been already paid.

The original agreement with the plaintiffs had not been abrogated; they were still his partners. The \$2,000 paid Struthers by them and the \$8,000 which they undertook to pay enabled Loveridge to exercise the option without the expenditure of a dollar of his own money. The false and fraudulent representation that the property was costing \$60,000 was continued. Both Grosch and Smith were undoubtedly partners with Loveridge. The latter did not disclose to his co-partners the fact that he was agreeing to purchase the property from Mrs. White for \$48,500. His duty was to make such a disclosure. The partnership was not ended, nor was the proper disclosure made to his co-partners by Loveridge when, a few days later, he obtained an option, subsequently carried out, for the sale of the property for \$68,000.

On absolutely settled law, for which it is, I think, unnecessary to cite cases, the plaintiffs were entitled to share in the secret profit which Loveridge made. There should be judgment accordingly and the appeal should be allowed, with costs of action.

If the amount to which the plaintiffs are entitled cannot be settled by the parties, there should be a reference to determine it, the plaintiffs to be entitled to the costs of the reference.

RIDDELL, J.A.:—These two actions were tried together before Mr. Justice McEvoy, resulting in a dismissal of both; the plaintiffs now appeal.

The defendant had an option to purchase certain lands in Windsor, under a document dated the 14th January, 1927; the option was to be taken up on or before 12 o'clock of the 15th February, and the sum of \$100 is expressed as having been paid for the option. The purchase-money was \$48,500, and the acceptance was to be accompanied by a cheque for \$9,000, accepted by some bank in Windsor.

On the 17th January, the defendant saw the plaintiff Grosch in Windsor, when it was arranged that they would have a business talk the next day, as to real estate; the next day, the defendant shewed Grosch the property upon which he had an option, said it was owned by Mrs. White (the person from whom he had the option), that he had an option on it for \$60,000, and that, while

it would take \$15,000 to "swing" the transaction, he thought that \$3,000 would be all that would be required to be raised in cash. He asked if Grosch would come into the deal and Grosch agreed to come in for a third share. Grosch also said that he thought he could get "a party or two" in Stratford, his home city, to take a third. Grosch saw the plaintiff Smith, and he also agreed to Riddell, J.A. go in for a third share.

On the 18th February, a document dated the 14th February was signed by the defendant and the plaintiffs, purporting to be an agreement by the three to purchase from the defendant the property at \$60,000. This was an informal way of forming a joint venture by the three to take over the option of the defendant; and it was signed by the plaintiffs in the belief that the defendant's option was for \$60,000, as he had said. Of course, this conduct on the part of the defendant was grossly fraudulent.

On the 15th February, the option having expired, the defendant, without the knowledge of the plaintiffs, obtained another option from Mrs. White at the price of \$50,000. On the 18th February, Grosch gave the agent of the defendant his cheque for \$1,000, Smith, the other plaintiff, having paid his \$1,000 to the defendant on the 10th February—these two sums were the proportionate part payable by the plaintiffs towards the \$3,000 said to be necessary to "swing the proposition." It is not and cannot be denied that the plaintiffs were entitled to the benefit with the defendant of his new option of the 15th February.

On the 14th March, the defendant took an agreement for the purchase of the property from Mrs. White for the alleged consideration of \$48,000, \$8,500 being already paid, and the balance payable in instalments stated. On the 17th March, he gave an option to sell at a price making the sale-price \$68,000—this option was taken up.

The plaintiffs claim to share in the profits of this sale; that they would have been entitled to some share, at least, if they had stayed with the undertaking, is not denied, but the defendant claims that they voluntarily withdrew.

The facts as to the alleged withdrawal are fairly clear. In the agreement for purchase by the three from the defendant, there was a provision for the payment of \$2,000 cash and on or before the 15th March, a further sum of \$13,000; the real intention being that Grosch and Smith, in addition to paying each \$1,000 cash, should each pay \$4,000 more by the 15th March. The defendant drew on Grosch for \$4,000; Grosch did not accept the draft, but wrote the defendant that he was in difficulties and said: "Much as I regret it, as a friend could you let me out of this deal?"

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App. Div. This letter was dated the 17th March; the defendant, on the 26th
1929. March, wrote Grosch, returning the cheque which Grosch had
GROSCH given to his agent, and saying: "I am sorry to hear of your deci-
v. sion in this matter." Of course, this was a clear acceding to
LOVERIDGE. Grosch's request; and, had not a very favourable deal been made
Riddell, J.A. before this letter, it is probable that we should have heard nothing
of these actions.

Smith's position is somewhat different; some time in March, the defendant and Grosch went to Smith's office, and the defendant asked Smith for the \$4,000 which he was to pay on the deal—Smith promised to pay in ten days; he went to Toronto on the 16th March to get the money and failed; then he called up the defendant on the telephone and told him of his disappointment, and asked to be released from the contract; the defendant demurred, and asked him to telephone or telegraph next day. The next day, Smith telegraphed: "Owing to financial disappointment in Toronto much regret cannot raise money *re* Victoria-street lot. Please release me of this obligation and cancel note given to you. Would be grateful if you can return payment made."

I think it is a fair conclusion from the evidence that the conversation of the previous day made an effective agreement that if Smith should telegraph his determination to withdraw, it would put an end to the contract; consequently, the relation of joint adventurers between Smith and the defendant ceased on the receipt of this telegram by the defendant; this was before the actual sale by the defendant, the profits of which the plaintiffs seek to share. Smith received back his \$1,000 on the 25th March—in ignorance of the sale by the defendant.

Returning, now, to Grosch, the defendant did not express his assent to Grosch's request; but, on the contrary, he wrote the same day to his agent: "I might add that Dr. Smith has refused his note, but I will carry on with Grosch as two-thirds owner." This, not being communicated to Grosch, cannot be considered an estoppel; but it is cogent evidence that the defendant was still holding Grosch to his contract. I am clear that Grosch was and must be considered a joint adventurer with the defendant till he was notified later that he was released.

Much has been said of the term in the original agreement between the three that time should be of the essence of the contract, and it may well be that the defendant was, on the 17th March, in the position that he might terminate the agreement *in invitum* the plaintiffs; but such a term does not work automatically, and it may be waived by the party entitled to take advantage

of it. In the present case, I think it clear that the defendant was waiving this term, and that, in the event, he did not so much as endeavour or pretend to take advantage of this provision, but, so far as Grosch was concerned, the arrangement was put an end to, by the defendant acceding to Grosch's request to be let out.

I think, then, that Grosch was a joint adventurer with the defendant when he effected the favourable deal with Ray—it was, in fact, an option, but it had every appearance of ripening into a sale, as actually happened.

The arrangement having been made early in the negotiations that the defendant should "have the say in swinging it in the resale," the matter was properly in his hands, and so long as the plaintiffs remained in the "deal" the defendant was their trustee and agent. He cannot say that Grosch was not his partner or *quasi*-partner, his *cestui que trust*; and the release from the undertaking was wholly ineffective, Grosch being in ignorance of the transaction whereby profit was made.

Smith's position, at first blush, might not be considered so clear, but I am of the opinion that he also is entitled to share in the profits. True he withdrew from the enterprise before any profit was made; but this he did in ignorance of his right to participate in the advantage of a contract in which the purchase-price of the land was \$48,500. While *Ignorantia juris quod quisque scire tenetur, neminem excusat*, the maxim applies to general principles of law and not to the individual rights of the person so ignorant—as it is sometimes expressed *Ignorantia legis non excusat; ignorantia juris excusat* — the word "jus" being used in the sense of individual right in law, and not the general law itself. Such ignorance of individual right is considered ignorance of fact, and *Ignorantia facti excusat*. We do not need, however, to go so far for the right; the plaintiffs were both ignorant of the fact of the actual price to the defendant of the land; and it was in such ignorance and in consequence of such ignorance that they withdrew from the deal. I am of the opinion that they are excused, by reason of their ignorance of their rights, from the withdrawal, and that they are at liberty to assert the rights they seemingly gave up in such ignorance. The appeal should be allowed with costs here and below. If the parties cannot agree as to the amount, the matter should be referred to the Master at Windsor, who will dispose of the costs of reference.

The maxims above mentioned are fully, carefully and accurately discussed in Broom, Legal Maxims, 9th ed., pp. 178 *et seq.*

ORDE, J.A., agreed with RIDDELL, J.A.

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MASTEN, J.A.:—These actions were tried before my brother McEvoy, who on the 21st August last gave judgment in each of them dismissing the plaintiffs' actions. Both plaintiffs now appeal to this Court, and the appeals were heard together.

The actions are brought by each of the plaintiffs severally for a one-third share in the profits realised out of the purchase and sale of an interest in certain lands in the city of Windsor.

I have had the privilege of reading the judgment prepared by my brother Riddell, and agree in the result at which he has arrived; but, as I look at the question from an aspect slightly different from his, I supplement his statement of facts without repeating all that he has stated.

On the 14th January, 1927, the respondent Loveridge obtained from one Mrs. Bernard A. White, of Detroit, an option to purchase certain property in the city of Windsor, at the price of \$48,500. He paid \$100 for the option. The purchase-price was to be payable as follows: \$10,000 on acceptance of the option, and the balance at the rate of \$5,000 yearly, with interest at 7 per cent.

At the time when the defendant Loveridge secured this option, he had no connection or association with either of the plaintiffs.

He first met the plaintiff Grosch on the 17th January, 1927, and that evening suggested to Grosch that as a real estate agent he would like to interest him and one or two others in a real estate property that he had down the street.

On the morning of the 18th, the property was visited by Loveridge, Grosch, and others, and at that time, according to Grosch's evidence, Loveridge said:—

"This property is owned by a woman in Detroit, Mrs. White. The price is \$60,000, that is the first cost. It will take \$15,000 to swing it, \$5,000 cash. I doubt whether the rest would be required because I expect this to be a quick transaction. Are you boys game to go into this deal? I would like very much to have just a few in it because I would like to be in a position to have the say in swinging it in the resale."

The evidence of Grosch is:—

"Q. What did he (referring to Loveridge) say, if anything, with respect to his part in it? A. He said, 'To shew you my faith in it I am willing to take a third.' I said, 'If Charlie here does not want the other third, I believe I have a party or two I could interest in Stratford.'

Subsequently the plaintiff Smith, a friend of Grosch, residing in Stratford, after investigation, agreed to join the syndicate.

His account of the representations made to him by Loveridge is as follows:—

“Q. Did he tell you what the price was A. \$60,000.

“Q. What was the arrangement that he wanted you to make as to buying it? A. He said that he thought so well of the property he would be willing to go in as one of a small syndicate of three to purchase the property, and we would pay share and share alike, the three of us. The price was to be \$60,000. He emphasised the fact that he wanted a small syndicate, he did not want a large syndicate, that would help him out in selling it. That he wanted a free hand in handling the property, as he said he understood values in Windsor better than we did, and he did not want us to hold out, and he wanted a free hand in selling it when he thought fit, if we went into the proposition.”

These statements which I have quoted from the evidence of Grosch and Smith are not controverted in the evidence of the defendant. The negotiations evidently culminated on or before the 10th February, for on that date Dr. Smith gave Loveridge his cheque for \$1,000, being one-thrd of the down-payment which Loveridge had said was requisite.

The written agreement between the three parties, respecting their joint venture, was filed as exhibit No. 1, and, omitting those provisions which are irrelevant to the present controversy, it reads as follows:—

“Offer to purchase.

“We, William H. Grosch, David Smith, and S.E. Loveridge of the city of Stratford (as purchaser) hereby agree to and with S.E. Loveridge (as vendor), through J.R.C. Struthers, to purchase all and singular the premises situate,” etc. (describing the lands in question) “at the price or sum of \$60,000 as follows, \$2,000 cash to the said agent on this date as a deposit, and covenant, promise, and agree to pay the balance on or before March the 15th, 1927, \$13,000. Yearly payments \$5,000 each with interest at 7% payable half-yearly, all to be paid in five years.”

Then follow the usual provisions as to searching of title, adjustments, etc., and it then proceeds:—

“This offer, if accepted, shall with such acceptance constitute a binding contract of purchase and sale. Time shall be of the essence of this agreement.

“Dated. A.D. 1927,

“W.H. Grosch,

“David Smith,

“S.E. Loveridge.

“Witness, J.R.C. Struthers.”

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1929. and covenant, promise, and agree to and with the said above
GROSCH named purchaser to duly carry out the same on the terms and
v. conditions above mentioned.

LOVERIDGE. “Dated February 14, A.D. 1927,

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“S.E. Loveridge.

“Witness: Violet Chalmers.”

On the 15th February, 1927, the option which had been given by Mrs. White to the respondent Loveridge was renewed on somewhat different terms, the option being again given to Loveridge, personally. It is only necessary to observe, in regard to this renewal or extension, that the purchase-price is named as \$50,000, that the option is given in consideration of the sum of “\$2,500, now paid by the purchaser to the vendor, the receipt whereof is thereby acknowledged,” and that the time for acceptance of the option is extended until the 15th March, 1927.

On the 18th February, Grosch gave Loveridge his cheque for \$1,000.

Nothing further of moment occurs until the succeeding 10th of March, when, as the period of the option was approaching an end, Loveridge went to Stratford to interview Smith and Grosch with respect to the payment which would necessarily have to be made on the 15th March in order to save the option. At that time both Smith and Grosch intimated to Loveridge that they were in some difficulty, at the moment, with respect to raising the necessary cash to meet their proportion of the payment which would have to be made on the 15th, and explained that they had been unfortunate in some other transactions in which they had been engaged. The result was that Smith then gave to Loveridge a 10-day note for \$4,000, to which arrangement Loveridge agreed, and he also arranged with Grosch that in lieu of cash he would draw on him at sight for \$4,000. It was evidently in contemplation at that time that the option would be taken up on or before the 15th.

It is to be observed that, while the agreement of joint venture quoted above called for a total payment of \$13,000 by the syndicate to Loveridge on or before the 15th March, the specific sum to be contributed by each co-adventurer is not specified, but at this interview in Stratford, on the 10th March, an understanding was reached that Smith and Grosch should each contribute \$4,000, making with their original cheques a total of \$5,000, or one-third of the cash payment which had been indicated by Loveridge as \$15,000.

While the syndicate agreement makes the time of payment to the respondent Loveridge on the 15th March of the essence of the contract, yet the arrangements made in Stratford on the 10th March, by which Loveridge agreed to take the Smith note at 10 days and the Grosch draft, are a waiver of that provision, though possibly conditional on payment of these securities, so that it may be taken as unquestionable that up to the 16th March both Smith and Grosch were entitled as co-adventurers along with Loveridge, and Loveridge was willing and anxious to carry on with them.

On the 15th March, Loveridge took up the option which he held from Mrs. White, and gave his own cheque for the necessary payment. The agreement with Mrs. White is dated the 14th March, but the transaction was evidently closed on the 15th, as appears from the date of Loveridge's cheque. Thus Loveridge became, on that date, the equitable owner of the property in question and a trustee for his co-adventurers.

On the 16th March, Smith called up Loveridge on the telephone and asked to be let out of the transaction. Loveridge's account of the conversation is as follows:—

"Q. Perhaps you might tell what occurred. A. He called up on the evening of the 16th, some time after 6 o'clock, I wouldn't say exactly what time, and said he had been out of town, I think Toronto he mentioned, and had met with business reverses, and he would be unable to look after his note on that property deal, and asked if I could let him out.

"Q. He was the man who had given you the note? A. Yes, he was the man who had given me the note. He asked me if I could see fit to return his money, and how I felt about it. I said I was not going to force him in connection with the property, but said perhaps I could dispose of it elsewhere, and I would deem it a favour if he would just either write or wire me of his decision in the matter.

"Q. This telegram we have is the result? A. The telegram was mailed that night and came in the next morning."

It reads as follows:—

"Stratford, Ont., March 16th, 1927. S. E. Loveridge, 73 Pitt-street, Windsor, Ont. Owing to financial disappointment in Toronto much regret cannot raise money *re* Victoria-street lot. Please release me of this obligation and cancel note given to you. Would be grateful if you can return payment made. D. Smith."

Smith's note was not paid, and the \$1,000 which he had contributed was returned to him by Loveridge.

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On the 17th March, one Ray asked Loveridge to give him an option on the property at \$68,000, and this was given, and subsequently, on the 28th March, was taken up by Ray's nominee or assignee and carried to completion.

Masten, J.A. On the 17th March, Grosch wrote asking to be let out. His letter was received on the 18th March, and was acceded to by Loveridge, who returned him his \$1,000 on the 26th March.

I agree with the finding of fact of the trial Judge that the motive which induced Smith and Grosch to ask that they be allowed to retire was that they were hard up, and was not any neglect or refusal on the part of Loveridge to give them formal acknowledgments of the transaction. Loveridge did not ask Smith or Grosch to retire, nor did he do or say anything which induced them to ask him to let them retire. The narrow question is this: When Smith and when Grosch asked Loveridge to let them retire, did he stand in such a relationship towards them that he was bound to disclose to both Smith and Grosch that the purchase-price payable to Mrs. White was \$50,000, and not \$60,000, and to disclose to Grosch that Ray had sought and obtained an option at \$68,000 on the 17th March?

It is plain that it was the common understanding of all three parties that Loveridge, being a real estate dealer living in Windsor, was to be the managing director of the syndicate, and he became in that way the confidential agent and advisor of his two co-adventurers. Such being the relationship of the parties, the case falls, in my opinion, within the principle that where a person agrees to give up his claim to property in favour of another, such renunciation will not be supported if, at the time of making it, he was ignorant of his legal rights and of the value of the property renounced, especially if the party with whom he dealt possessed and kept back from him better information on the subject: *McCarthy v. DeCaix* (1831), 2 Russ. & M. 614; *Smith v. Pincombe* (1852), 3 Macn. & G. 653; *Fane v. Fane* (1875), L.R. 20 Eq. 698.

In *McCowan v. Armstrong* (1902), 3 O.L.R. 100, at p. 108, Sir William Meredith says:—

“Although exceptional rules govern transactions in the nature of family arrangements, and agreements of that kind are upheld when, if they had been made between strangers, they would not be binding, it is well settled that even a family arrangement is not binding on one who has joined in it under a mistake as to his rights in the subject-matter, unless it has been fairly entered into without concealment or imposition on either side, with no suppression of what is true or suggestion of what is false, and a statement or suggestion which is false is fatal to the agreement,

though it has been innocently made: *Fane v. Fane* (1875), L.R. 20 Eq. 698, and the cases there cited.

"*Fane v. Fane* was the case of a false recital as to the right of a father under an existing settlement to charge property which was being resettled by the instrument which was in question in that case, and it was held that the false recital was fatal to it, though it was made under a mistake, because the father was accessory to it."

The same principle was applied by the Supreme Court of Canada in the case of *Bentley v. Nasmith*, 46 Can. S.C.R. 477. In that case the head-note is as follows:—

"A broker being informed by the owners that they would sell certain lands entered a description of the property in his list of lands for sale through his agency. The lands being still unsold about three months later, the broker, in consideration of a payment of \$50, obtained an exclusive option from the owners for the sale or purchase by himself, within 30 days, of the lands at a price named, which was to include his commission in the event of his effecting a sale, but without disclosing information of which he was then possessed that there was a probability of the lands selling within a short time at an increased price. Within a few days after the date of the option he effected a sale, in his own name, of the lands for double the price named therein, notified the owners that he exercised his option to purchase and demanded a conveyance. In an action for specific performance, brought by the broker on refusal of such conveyance,

"*Held, per* Fitzpatrick, C.J.—That by the terms of the written agreement the broker became an agent for the sale of the lands with the option of purchasing them for himself; that he could not become purchaser until he had divested himself of his character as agent; that he was, as agent, bound to disclose to his principals the knowledge he had acquired respecting the improved prospects of a sale at enhanced value, and his exercise of the option to purchase did not relieve him of this obligation. He was, therefore, not entitled to a decree for specific performance.

"*Per* Davies, Idington, Anglin, and Brodeur, JJ.—That the broker was an agent for the sale of the lands at the time he procured the option, and, having failed in his duty to disclose to his principals all material information he had as to the probability of the lands selling at a higher price than that mentioned, specific performance of the agreement to sell to him should be refused.

"The judgment appealed from (16 B.C. Rep. 308) was reversed."

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Masten, J.A. Neither to Smith nor to Grosch did the respondent Loveridge ever disclose the fact that the price to be paid to Mrs. White for the property was \$50,000, and not \$60,000. Having acquired the White option personally in his own name before any relationship existed between him and the plaintiffs, he might have been justified in asking them to come with him into a syndicate to take the property at \$60,000, provided it had been made plain to them that it was none of their business what price he was paying under the option which he held. But in the present case it is entirely clear that Smith and Grosch were led to suppose that Mrs. White's price was \$60,000; that they were coming in on what is known in real estate parlance as "the ground floor," and that all the co-adventurers stood on an equal footing.

Nor did Loveridge disclose to Grosch when, on the 18th March, he received his letter asking to be let out, that on the 17th Ray had asked for and had been given an option at \$68,000.

On this ground I think each of the plaintiffs is entitled to a declaration that his agreement to give up his interest in the syndicate is null and void, and that he is entitled to a one-third share in the net profits of the transaction in question, and I concur in the proposal of my brother Riddell that, if the parties cannot agree on the amount of such net profit, there should be a reference to the Local Master.

The plaintiffs are each entitled to costs down to and including this appeal.

Costs of the reference (if had) to be in the discretion of the Master.

FISHER, J.A., agreed with MASTEN, J.A.

Appeal allowed.

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Dec. 18.

WODELL v. POTTER.

Church—Property of Congregation Vested in Trustees upon Trusts Set out in Deed—Declaration as to Persons Entitled to Benefit under Deed—Power to Require Persons to Sign Confession of Faith—Appeal—Variation of Judgment below.

The judgment of KELLY, J., *ante* 27, was varied upon appeal, but in the main affirmed.

It was declared that the plaintiffs held the lands which were the subject of the trust deed in trust for the persons described in the deed and for no others, and that any and all action of the defendants derogatory thereto was invalid to deprive them of their rights under

the deed; this is independent of the question whether the document which the minority were required to sign was in accord with the beliefs mentioned in the deed; and no power is given to any one—certainly not to other beneficiaries—to compel a written confession of faith.

And held, upon a motion by the plaintiffs to vary the judgment pronounced by the Court as above, by declaring that those members of the church who sided with the plaintiffs in the dispute had alone the right to use the property mentioned in the trust deed, and that they were the sole persons to be permitted to determine the denominational relations of the church, that the Court should not attempt to go further than to declare the rights of the plaintiffs in respect of the class of persons for whom they hold the church property; and the motion was dismissed.

AN appeal by the defendants from the judgment of KELLY, J., the reasons for which are reported *ante* 27.

The judgment, as drawn up, signed, and entered, was as follows:—

1. This action coming on for trial on the 4th day of February, 1929, at the sittings holden at Hamilton, Ontario, for the trial of actions without a jury, in presence of counsel for all parties, upon hearing read the pleadings and hearing the evidence adduced and what was alleged by counsel aforesaid, this Court was pleased to direct that this action stand over for judgment; and the same coming on this day for judgment:—

2. This Court doth declare that the plaintiffs and the defendants William George Potter and E. Friend hold all and singular the lands situate, lying, and being in the city of Hamilton in trust for a congregation composed of those members of Hughson Street Regular Baptist Church who have not signed the certificate of acceptance of the Declaration of Faith as contained in the Constitution of the Union of Regular Baptist Churches of Ontario and Quebec referred to in the minute-book of the clerk of the said Hughson Street Regular Baptist Church under date of the 16th of November, 1927, and doth order and adjudge the same accordingly.

3. This Court doth further declare that the resolution recorded in the said minute-book in the minutes of a meeting of the members of the congregation of the said Hughson Street Regular Baptist Church under date of the 26th of October, 1927, to the effect that the congregation of Hughson Street Regular Baptist Church should join the Union of Regular Baptist Churches of Ontario and Quebec, a new organisation formed some time in the year 1927, is null and void, and doth order and adjudge the same accordingly.

4. This Court doth further declare that the resolution recorded in the said minute-book under date of the 16th of November, 1927, at a meeting of the members of the said Hughson Street Regular

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Baptist Church, whereby it was resolved that the clerk of the church should place in the hands of every member a copy of the constitution of said Union of Regular Baptist Churches of Ontario and Quebec formed in the year 1927, incorporated in which constitution were the articles of faith subscribed to by the said new organisation, and that all members of the said church be required to sign a statement of their acceptance of the said articles of faith, and that any members of Hughson Street Regular Baptist Church failing to sign an acceptance of said articles of faith and return the same to the clerk of the church not later than December 16th, 1927, should be considered out of harmony with the doctrinal position of the said church, and without further action should cease to be a member of the said church, is null and void, and doth order and adjudge the same accordingly.

5. This Court doth further declare that the annual meeting of the said Hughson Street Regular Baptist Church held on or about the 4th day of January, 1928, was irregular and is null and void and doth order and adjudge the same accordingly.

6. And this Court doth further order and adjudge that the defendants be and they are hereby restrained from interfering with the administration of the affairs of Hughson Street Regular Baptist Church or from parting with or otherwise in any manner whatsoever dealing with the property of Hughson Street Regular Baptist Church.

7. And this Court doth further order and adjudge that the defendants do pay to the plaintiffs their costs of this action forthwith after taxation thereof.

8. And this Court doth further order and adjudge that the counterclaim of the defendants herein be and the same is hereby dismissed with costs.

October 22. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

C. W. Bell, K.C., for the appellants, argued that they and those who with them constituted a majority of the church membership had a right to pass the resolutions of the 26th October and the 16th November, 1927. Requiring the members of the congregation to sign the "New Articles of Faith" was a matter of procedure within the powers of the majority. The tentative constitution of the Union of Regular Baptist Churches of Ontario and Quebec re-affirmed the doctrines laid down in the trust-deed in respect of which the trustees hold the property, and any articles added to it were merely supplementary or explanatory. Under the constitution of the Hughson Street Baptist Church,

as set out in the Newton Brown Manual, the will of the majority governs. The lands were not held in trust only for those members of the church who had not signed the certificate of acceptance of the declaration of faith. It was wrong to exclude the non-signers from membership in the church.

Gideon Grant, K.C., and W. F. Schwenger, for the plaintiffs, respondents, contended that the defendants and those who with them constituted a majority of the congregation had no right to pass the resolutions referred to, nor any power to compel any one to sign a declaration of faith on pain of expulsion from membership in the church: *Forler v. Brenner* (1922), 21 O.W.N. 489. The resolutions referred to would deprive the church of the benefits of the convention. All the authorities on the questions involved are referred to by Kelly, J., in his reasons for judgment.

November 8. The judgment of the Court was read by RIDDELL, J.A.:—This is an appeal by the defendants from the judgment at the trial of Mr. Justice Kelly, reported in 64 O.L.R. 27, where the facts are set out.

The case arises out of a controversy in the Baptist Church, with the merits of which this Court has here nothing to do, and concerning which we, of course, express no opinion. All we are concerned with is the legal right in respect of certain real property of the parties to this action, and, inferentially, the rights in that regard of those whom they represent in fact, if not in law.

In 1909 and previously there was in Hamilton a religious society or congregation of Christians known as "The Hughson Street Baptist Church," desiring to take a conveyance of certain lands, they took advantage of the provisions of the Property of Religious Institutions Act, R.S.O. 1897, ch. 307, and nominated certain trustees to whom the land was to be conveyed. A conveyance was made to certain persons named, "to have and to hold unto and to the use of the said parties of the second part" (the trustees named), "their successors and assigns for ever, upon trust that the same shall be held for the use for the purpose aforesaid of the members of a Regular Baptist Church, which church shall be exclusively composed of persons who have been baptised by immersion, on a personal profession of their faith in Christ, and who hold the following doctrines, that is to say" (Follow a number of tenets which, as not, in my view, material, I pass over.) "The purpose aforesaid" refers to the preamble of the deed, in which it is stated that the congregation was "desirous of taking a conveyance of land for the site of a church, chapel, meeting house, burial ground, residence for a minister, or for any other religious or congregational purpose whatever"

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A great deal of argument was directed to the creed, etc., of the Baptist Church at the time of this deed; but it seems to me that the deed, being wholly unambiguous, must be its own interpreter—for the purpose of determining the objects of the trust, we need not and should not go beyond the deed itself. Those for the use of whom the trustees were to hold the land were to be members of a Regular Baptist Church; the Church was to be exclusively composed of persons baptised by immersion after personal profession of faith in Christ, and holding certain specified beliefs. It is a matter of not the slightest importance what the members of the existing Church, or Baptists generally, believed; if they or any of them were to participate in the benefits of this deed, he, she, or they must come within the words of the description of the beneficiaries. Moreover, any one who should come within the definition in the deed was entitled to the benefits thereof—whatever the original intention may have been, the deed is quite clear.

Whether any person came within the description is a question of fact; but there is no authority, express or implied, given to any one to add to the qualifications set out in the deed. Nor is there any authority given to any one to require the person claiming under the deed to prove his qualifications by signing any document. I can well conceive of a case—most of us have seen such—where a person believed in a doctrine but would decline to certify his belief by a signature.

The defendants required certain persons to sign a document or be excluded from the benefits of the deed. It is to be observed that it was not the trustees under the deed who required this, but other persons claiming to be entitled to such benefits—in other words, some of the *cestuis que trustent* took it upon themselves to compel others who had been undoubtedly proper objects of the trust to sign a document or be deprived of their position as beneficiaries. Such a proposition is plainly absurd—these *cestuis que trustent* stood in no higher position than those they proposed to oust, and their proposed action was a simple usurpation of a power that did not belong to them.

The judgment should declare that the plaintiffs hold the land in trust for the persons described in the deed and for no others; and that any and all action of the defendants derogatory thereto is invalid to deprive them of their rights under the deed.

This is wholly independent of the question whether the document which the minority were required to sign was in accord with the beliefs mentioned in the deed—and I have not so far thought it necessary to consider how the fact stands in that regard. There

is no pretence that those proposed to be excluded were not "members of a Regular Church," and, consequently, I think their rights are clear.

As I have said, this is wholly apart from the question whether the document which the minority were required to sign went beyond the requirements of the deed—in my view there is no power given to any one—certainly not to other beneficiaries—to compel a written Confession of Faith. On this basis, I understand, the defendants have no objection to para. 2 of the judgment; if they have such objection, the paragraph should be amended to correspond with the deed.

As I think we can in this action deal only with the rights in respect of the land, the paragraphs 3, 4, and 5 should be limited in their scope to effect upon the beneficiaries under the deed; we do not assume power to allow or prevent the members of this congregation joining any body—but such action is not to affect the trust of the deed. Paragraphs 6, 7, and 8 should stand.

The appellants should pay the costs of this appeal.

There is no cross-appeal; and the judgment appealed against does not deprive those who have signed the document of their right to benefit under the deed. I am not to be taken as disagreeing with the conclusions of Mr. Justice Kelly as to its inconsistency with the doctrines specified in the deed; but I do not think there is any necessity to decide that question.

It may be well to particularise the changes to be made in the judgment. Paragraph 2 should provide that the trust is for a congregation composed exclusively of members of a regular Baptist Church, which church shall be exclusively composed of persons who have been baptised by immersion on a personal profession of their faith in Christ and to hold the doctrines set forth in the deed of trust dated the 18th March, 1909, in the pleadings mentioned, and without further qualifications or addition.

To paras. 3, 4, and 5 should be added, "in so far as it assumes to affect the rights of the *cestuis que trustent* under the trust deed hereinbefore mentioned, and doth order and adjudge the same accordingly."

Paragraph 6 should read: "And this Court doth further order and adjudge that the defendants be and they are hereby restrained from interfering with the administration of the affairs of Hughson Street Regular Baptist Church by the board of trustees of the said church duly appointed and by their successors, and from parting with or otherwise in any manner whatsoever dealing with the property of Hughson Street Regular Baptist Church."

Paragraphs 7 and 8 will stand.

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App. Div. December 16. *Grant*, K.C., and *Schwenger*, for the plaintiffs,
1929. respondents, moved to vary the judgment of the Court.

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Riddell, J.A. December 18. The judgment of the Court upon the motion was read by RIDDELL, J.A.:—This is a motion by the plaintiffs asking that the judgment of this Court, as pronounced on the 8th November, 1929, *supra*, be made more inclusive and as in the judgment after the trial before Mr. Justice Kelly, *ante* 27.

What, in effect, we are asked to do is to declare that the particular section of the Hughson Street Baptist Church who side with the plaintiffs in this unfortunate dispute have alone the right to use the property mentioned in the trust deed; and, further, that they are to be the sole persons to be permitted to determine the religious or rather denominational relations of the said church.

So far as concerns the former claim, there can be no doubt of the power and consequently the duty of this Court to pass upon the right of any person to use the said property, if such person is properly before the Court and the relief claimed has been asked in the pleadings.

In that view, it seems necessary to scrutinise the statement of claim, and, in doing so, we should be as liberal as justice to the defendants will permit.

The plaintiffs are five of the seven trustees of the trust deed, and they purport to sue “on behalf of themselves and all other members of Hughson Street Baptist Church, except the defendants”—consequently, the attack is made upon the three defendants only. The defendants are two of the trustees and the pastor of the congregation.

The statement of claim sets out: (1) The status of the plaintiffs; (2) The status of the defendants; (3) The execution of the trust deed; (4) The trusts declared in the trust deed:—

“Upon trust that the same shall be held for the use, for the purposes aforesaid, of the members of the Regular Baptist Church, which church shall be exclusively composed of persons who have been baptised by immersion, on a personal profession of their faith in Christ, and who hold the following doctrines, that is to say:—

“The being and unity of God; the existence of three equal persons in the Godhead; the inspiration of the Old and New Testaments; the total depravity of man; election according to the foreknowledge of God; the Divinity of Christ and the all-sufficiency of His atonement; justification by faith alone in the righteousness of Christ; the work of the Holy Spirit in regeneration; perseverance of the saints; the resurrection of the dead; the final

judgment; the punishment of the wicked, the blessedness of the righteous, both eternal; the immersion of believers in water in the name of the Father, Son, and Holy Spirit, the only baptism, the Lord's Supper, a privilege peculiar to baptised believers; a church, a company of baptised believers, voluntarily associated and meeting in one place on the first day of the week for mutual edification, and the maintenance and propagation of these doctrines; the word of God, a complete and infallible rule of faith and practice; the religious observance of the first day of the week; and the obligation of every intelligent creature to believe the record which God has given of His Son."

(5) The provisions in the trust deed in case the said church should cease to exist (these, not being relied on or of consequence in this action, are not copied).

(6) That the said lands and the buildings thereon have been occupied by a congregation of a Regular Baptist Church, sending delegates to the Baptist Convention of Ontario and Quebec.

(7) That on the 26th October, 1927, at a meeting of some but not all the members of this congregation, by a majority vote, a resolution was passed that the congregation should join a new organisation formed in 1927.

(8) That on the 16th November, 1927, at a meeting of some of the members of that church, among whom were the defendants, a resolution was passed that the clergy of the church should place in the hands of each member a copy of the constitution of the new organisation, that all members should be required "to sign a statement of their acceptance of the said articles of faith," that any member refusing so to sign and return the same to the clerk of the church not later than the 10th December, 1927, should "be considered out of harmony with the doctrinal position of said church, and without further action should cease to be a member of said church."

(9) That the said articles of faith restrict the interpretation of and make addition to the original declaration of faith contained in the trust deed.

(10) That the defendants have signed the said articles of faith.

(11) That at a meeting, on the 4th January, 1928, being the annual meeting of the church, the defendant Bower, acting as chairman, announced that those who had signed should alone take part in the meeting—"The plaintiffs and other members of said church have consequently been deprived of their rights as members of said church in good standing and particularly of the right to vote at meetings of the said church."

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(12) The defendants as a result of the said resolution to join the new organisation have effected the result that the subscriptions from the church to the missions, etc., of the Baptist Convention of Ontario and Quebec have ceased, and have been diverted to other purposes.

The plaintiffs therefore claim:—

1. That they and the other trustees, defendants, hold the lands in trust for a congregation composed of those members of Hughson Street Baptist Church who have not signed the certificate, etc.

2. A declaration that the resolution of the 26th October, 1927, is null and void.

3. A declaration that the resolution of the 16th November, 1927, is null and void.

4. A declaration that the annual meeting of the 4th January, 1928, was irregular and void.

5. An injunction restraining the defendants from interfering in the administration of the affairs of Hughson Street Regular Baptists, and restraining them from parting with or otherwise in any manner whatsoever dealing with the property of Hughson Street Regular Baptist Church.

6. Other relief, just under the circumstances.

The defendants put the plaintiffs to the proof of all the allegations in the statement of claim.

The formal judgment entered after the trial declares:—

2. That the trustees hold in trust for "the congregation composed of those members of Hughson Street Regular Baptist Church who have not signed" the certificate.

3. The resolution of the 26th October, 1927, null and void.

4. The resolution of the 15th November, 1927, null and void.

5. The annual meeting of the 4th January, 1928, null and void.

6. The defendants are enjoined from "interfering with the administration of the affairs of Hughson Street Regular Baptist Church or (*sic*) from parting with or otherwise in any manner whatsoever dealing with the property of Hughson Street Regular Baptist Church."

7. Costs to be paid by the defendants.

8. Counterclaim of the defendants dismissed with costs. (This counterclaim, which was not pressed before us, was for the payment of moneys alleged to belong to the church, but wrongfully detained by the plaintiffs.)

We have declared that the resolutions and annual meeting are wholly null and void, so far as they or any of them may affect the rights of the plaintiffs or the members of the congregation for whose protection they bring this action in respect of the property

in the trust deed mentioned. And it is not to be forgotten that they affect to represent all the members except the defendants. This, however, does not go so far as they ask in their pleadings—they desire a declaration that those who signed the articles of faith of the new organisation shall be declared not entitled to any of the benefits thereof. If they proved at the trial that the defendants or any of them did not answer the description contained in the trust deed of the *cestuis que trustent*, they might well be held entitled to such a declaration on proper pleading. Here there is no allegation that the defendants are not members of a Regular Baptist Church, exclusively composed of persons who have been baptised by immersion, on a personal profession of their faith in Christ," or do not "hold the . . . doctrines" set out in the trust deed. The former qualification is not so much as mentioned, while of the latter it is said only that they have signed a certificate of their acceptance of articles of faith which "restrict the interpretation of and make new additions to the original declaration . . . in the . . . deed."

Assuming, however, that this is intended as a statement that they believe what they have signed, the mere addition of other articles to their creed is not forbidden by the original declaration—of course, if the new articles were contradictory of the original, the case would be different, as no one is considered to hold two contradictory doctrines—at least, doctrines which he sees are contradictory.

Nor is an article which "restricts the interpretation" of another a contradiction of that other—with, of course, the same qualification as in the former case.

I shall assume, however, that what is meant to be alleged is that the defendants do not believe in the doctrines set out in the trust deed; making it clear that any judgment can affect as *res adjudicata* only the defendants themselves, they not having obtained leave to defend for others in the same interest (Rule 75), and all persons against whom relief is claimed being entitled to their day in Court. Setting the original and the proposed new articles of faith opposite each other, we find that the original, "The being and unity of God, the existence of three equal persons in the Godhead," becomes in the new:—

"II. Of the Trinity.

"(1) We believe that there is (a) one, and only one, living and true God, an infinite intelligent Spirit, the maker and supreme ruler of heaven and earth; (b) inexpressibly glorious in holiness, and worthy of all possible honour, confidence and love; (c) that in the unity of the Godhead there are three persons, the Father, the

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1929. executing distinct but harmonious offices in the work of redemption.
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v. “(2) We believe (a) that Jesus Christ was begotten of the
POTTER. Holy Ghost in a miraculous manner (b) born of Mary, a virgin,
Riddell, J.A. as no other man was ever born or can ever be born of woman, and
(c) that He is both the Son of God and God the Son.

“(3) That the Holy Spirit is a divine person, (a) equal with God the Father and (b) God the Son and (c) of the same nature; (d) that He was active in the creation; (e) that in His relation to the unbelieving world He restrains the Evil one until God's purpose is fulfilled; (f) that He convicts of sin, of righteousness and of judgment; (g) that He bears witness to the truth of the gospel in preaching and testimony; (h) that He is the Agent in the New Birth; (i) that He sanctifies, and assures to us all the benefits of salvation.”

In these sentences, “The being and unity of God” and “the existence of three equal Persons in the Godhead” are expressly stated, and no one can find in them anything inconsistent with the original.

“The Inspiration of the Old and New Testaments” is paralleled by the new:—

“I. Of the Scriptures.

“We believe that the Holy Bible was (a) written by men supernaturally inspired; (b) that it has truth without any admixture of error for its matter; and (c) therefore is and shall remain to the end of the age, the only complete and final revelation of the will of God to men; the true centre of Christian union, and the supreme standard by which all human conduct, creeds and opinions, should be tried.

“(Explanatory.)

“1. By ‘The Holy Bible’ we mean that collection of sixty-six books, from Genesis to Revelation, which, as originally written, does not only contain and convey the Word of God, but is the very Word of God.”

“2. By ‘Inspiration’ we mean that the books of the Bible were written by holy men of old, as they were moved by the Holy Spirit, in such a definite way that their writings were supernaturally inspired and free from error, as no other writings have ever been or ever will be inspired.”

The Inspiration of the two Testaments is expressly stated, and nothing is set out which, in the least, contradicts it. “The total depravity of man” becomes:—

"V. Of the Fall of Man."

"We believe (a) that man was created in innocence under the law of his Maker, but (b) by voluntary transgression fell from his sinless and happy state, (c) in consequence of which all mankind are now sinful and are sinners not by constraint but by choice; and (d) therefore under just condemnation without defence or excuse; and (e) that man in his natural state is in a condition of total depravity, by which we mean his natural utter incapacity to receive the things of the Spirit of God apart from the quickening grace of the Holy Spirit."

This is explicit enough and in no way contradictory of the original.

"Election according to the foreknowledge of God" becomes:—

"VII. Of Grace in the New Creation."

"We believe (a) that, in order to be saved, sinners must be born again; (b) that the new birth is a new creation in Christ Jesus; (c) that it is instantaneous and not a process; (d) that in the new birth the one dead in trespasses and in sins is made a partaker of the divine nature and receives eternal life as the gift of God; (e) that such are kept by the power of God, through faith unto eternal salvation, and shall never perish; (f) that the new creation is brought about in a manner above our comprehension, not by culture, not by character, nor by the will of man, but wholly and solely by the power of the Holy Spirit in connection with divine truth, so as to secure our voluntary obedience to the gospel; (g) that its proper evidence appears in the holy fruits of repentance and faith and newness of life."

"The Divinity of Christ and the all sufficiency of His atonement" becomes:—

"VI. Of the Atonement for Sin."

"We believe (a) that the salvation of sinners is wholly of grace; (b) through the mediatorial offices of the Son of God, who, by the appointment of the Father, freely took upon Him our nature, yet without sin, honoured the divine law by His personal obedience, and by His death made a full and expiatory atonement for our sins; (c) that His atonement consisted not in setting us an example by His death as a martyr, but was the voluntary substitution of Himself in the sinner's place, bearing the penalty of God's Holy Law, the just dying for the unjust, Christ, the Lord, bearing our sins in His own body on the tree; (d) that, having risen from the dead, He is now enthroned in heaven, and, uniting in His person the tenderest sympathies with divine perfection, He is every way qualified to be a suitable, a compassionate, and an all-sufficient Saviour."

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"The Divinity of Christ" has already been declared; and this article states the "all-sufficiency of His atonement" with nothing contradictory of it. "Justification by faith alone in the righteousness of Christ" becomes:—

"VIII. Of Justification."

Riddell, J.A. "We believe that the great gospel blessing which Christ secures to such as believe in Him is justification; (a) that justification includes the pardon of sin, and the gift of eternal life on principles of righteousness; (b) that it is bestowed not in consideration of any works of righteousness which we have done; but it is the imputation of the righteousness of Christ on the ground of His perfect life and expiatory death."

There is nothing contradictory here of the original. "The work of the Holy Spirit in Regeneration" is paralleled by passages in article VII., the New Birth (*re*, again, *genero*, bring to life) or New Creation, being declared to be "wholly and solely by the power of the Holy Ghost."

"Perseverance of saints" is, at least, indicated in article VII. (e), and nowhere contradicted.

"The resurrection of the dead" is indicated in article XI. (d), which speaks of "the everlasting felicity of the saved and the eternal penal suffering of the lost;" and is nowhere contradicted.

"The final judgment" calls for the same observation.

"The punishment of the wicked and the blessedness of the righteous, both eternal" becomes "after death . . . the everlasting felicity of the saved and the everlasting penal suffering of the lost." Article VII. (d), "The immersion of believers in water in the name of the Father, Son, and Holy Spirit, the only Baptism," the Lord's Supper, a privilege peculiar to baptised believers, is paralleled by:—

"X. Of Baptism and the Lord's Supper."

"We believe that Christian baptism is (a) the immersion in water of a believer; (b) into the name of the Father, the Son, and the Holy Ghost; (c) to shew forth our union with the crucified, buried, and risen Christ, and our death to sin and resurrection to a new life; (d) that it is a condition of church membership and of the observance of the Lord's Supper (e) in which the members of the church by the sacred use of bread and wine are to commemorate together the love of Christ, preceded always by a solemn self-examination."

"A church, a company of baptised believers, voluntarily associated and meeting in one place on the first day of the week for mutual edification and the maintenance and propagation of these doctrines" becomes:—

“IX. Of the Church.

“We believe that a local New Testament Church is a congregation of immersed believers (a) associated by a covenant of faith and fellowship of the gospel; (b) observing the ordinances of Christ; (c) governed by His laws; and (d) exercising the gifts, rights and privileges, invested in them by His word; (e) that its officers are pastors (or elders or bishops) and deacons, whose qualifications, claims and duties, are clearly defined in the Scriptures; (f) we believe the true mission of the church is found in our Lord’s commission: First, to teach, or disciple, all nations, i.e., to preach the gospel in all the world, to make individual disciples; second, to baptise, third, to teach and instruct as He has commanded, and thus to build up the church. (We do not believe in the reversal of this order); (g) we hold that the local church has the absolute right of self-government free from the interference of any hierarchy of individuals or organisations; and that the one and only superintendent is Christ, through the Holy Spirit; (h) that it is scriptural for true churches to co-operate with each other in the furtherance of the gospel and in contending for the faith, and that every church is the sole and only judge of the measure and method of its co-operation; (i) on all matters of membership, of polity, of government, of discipline, or benevolence, the will of the local church is final.”

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There is no contradiction of the original.

“The Word of God, a complete and infallible rule of faith and practice,” has its counterpart in article I.:—

“I. Of the Scriptures.

“We believe that the Holy Bible was (a) written by men supernaturally inspired; (b) that it has truth without any admixture of error for its matter; and (c) therefore is, and shall remain to the end of the age, the only complete and final revelation of the will of God to men; the true centre of Christian union, and the supreme standard by which all human conduct, creeds and opinions, should be tried.”

The religious observance of the first day of the week is not repeated but is not contra-indicated in the new articles; nor, except by implication, is “obligation of every intelligent creature to believe the record which God has given to us of His Son,” but it would be absurd to suggest that these tenets are denied.

The new articles give the tenets as to Satan, the Fall of Man, the Creation, Civil Government, and the Second Coming; these are not among the original tenets set out in the deed; and we have said—and I now repeat—no one has authority to require a belief in any of them as a condition of being considered a *cestui que*

App. Div. *trust* in the deed; whether they are to believe in them or any of them is to be left to private judgment. Probably no question will arise as to the belief in any of them; but with that the Court has here nothing to do.

Riddell, J.A. Assuming, then, that it has been proved that the defendants believe in the new articles, I can find nothing that proves or even tends to prove that they do not believe in the original tenets set out in the trust deed; and there is no foundation for the claim to have them declared outside its ambit.

I may illustrate my views by an example: suppose that the requisite to being a *cestui que trust* was a belief in the Thirty-nine Articles or in the Westminster Confession of Faith; and a congregation of the Church of England or of the Presbyterian Church should find some of its members taking up the belief in "Anglo-Israel," while the others did not; suppose either section to attempt to exclude the other from the benefit of the trust—could it be argued that either would or should succeed?

The Court has no jurisdiction in this case to enter upon the belief of any man, except as the inquiry may be necessary to determine property-rights of some kind. We have declared the rights of the plaintiffs in respect of the class of persons for whom they hold the property in question; and that is as far as we should attempt to go.

What may be the effect in case the congregation comes to an end will be considered if and when that takes place; there is no suggestion of the necessity of any immediate declaration of rights in that event; and we should not make a declaratory decree without need.

Nor does the question arise before us whether any one not a member of the congregation of this Hughson Street Baptist Church can be a *cestui que trust* under this deed; that question will be dealt with if and when it arises.

I can find no justification for our going any further than we have in our judgment, *supra*; and would dismiss this motion with costs.

We have thought it well to give our reasons at length, because of what the parties considered the great importance of the decision—not because of any real doubt we entertained on any of the many matters brought to our attention.

Motion dismissed.

[GARROW, J.]

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Negligence—Motor-vehicle upon Highway—Injury to Person Standing in Roadway — Negligence of Driver — Absence of Contributory Negligence—Finding of Trial Judge—Death of Person Injured after Action Brought by her but before Trial—Revivor in Name of Administratrix—Second Action under Fatal Accidents Act, R.S.O. 1927, ch. 183—Right to Maintain both Actions—Trustee Act, R.S.O. 1927, ch. 150, sec. 37—Assessment of Damages in both Actions—Allowance for Pain and Suffering in First—Reasonable Expectation of Pecuniary Benefit by Mother of Deceased—Costs—Consolidation of Actions.

A girl, 19 years of age, was injured, while standing in the roadway of a city street waiting to board a street-car, by a motor-truck owned by the defendant company and driven by the defendant B., a driver employed by the company:—

Held, upon the evidence, that B. was negligent in his operation of the truck; that there was no contributory negligence on the part of the girl; and that B. was liable, as driver, and the company, as owner, for the consequences of B.'s negligence.

The injured girl and her mother began an action against the defendants on the 26th January, 1928; but the girl died in the month of May following, the action not having been brought to trial, and it was revived in the name of her administratrix by order of revivor, and brought to trial along with a second action begun by the administratrix on the 22nd February, 1929. The two actions were tried together, and the above finding of negligence was made in both by the Judge who tried them without a jury:—

Held, that the administratrix had the right to maintain both actions. The first action was properly revived in her name, she being entitled, under sec. 37 of the Trustee Act, R.S.O. 1927, ch. 150, to maintain an action for all torts or injuries to the person of the deceased.

McHugh v. Grand Trunk Railway Co. (1901), 2 O.L.R. 600, distinguished.

Section 37 was enacted to prevent the wrongdoer escaping liability by reason of the death of the person injured, and not for the purpose of creating a new right of action.

Mason v. Town of Peterborough (1893), 20 A.R. 683, and *England v. Lamb* (1918), 42 O.L.R. 60, followed.

In the first action the administratrix was entitled to recover all the damages down to the date of the death which the deceased herself could have recovered had her action been brought to trial before that date; and there was no reason for excluding from the assessment of damages an allowance for the physical injury done to the original plaintiff and her pain and suffering.

In the second action, which was brought by the administratrix under the Fatal Accidents Act, she was held entitled to recover, for the benefit of the mother of the deceased, a sum of money based on the mother's reasonable expectation of pecuniary benefit from the continuance of the daughter's life.

The plaintiff was entitled to costs, but not to two sets of costs throughout: the costs should be taxed as if the actions had been consolidated upon the delivery of the statement of defence in the second action.

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Two actions to recover damages for injury to and consequent death of Violet Bowler, who was struck by a motor-truck of the defendant National Grocers Company Ltd., driven by the defendant Blake, upon a highway in the city of Toronto, by reason, as alleged, of the negligence of Blake.

The actions were tried together before GARROW, J., without a jury, at a Toronto sittings.

G. W. Mason, K.C., and R. L. Kellock, for the plaintiff.

F. J. Hughes, K.C., for the defendants.

November 9. GARROW, J.:—These are two actions tried together, both relating to a motor accident in which Violet Bowler sustained very serious injuries, from which she subsequently died.

The first action was begun on the 26th January, 1928. Violet Bowler died in the month of May following, and the action was revived in the name of her administratrix, by order of revivor.

The second action, which was an action under the Fatal Accidents Act, R.S.O. 1927, ch. 83, was begun on the 22nd February, 1929, by the administratrix of the estate of Violet Bowler, deceased.

A motion was made to set aside the praecipe order of revivor in respect of the first action, the contention being that that action came to an end upon the death of Violet Bowler. That motion was refused, but leave was given to the defendants to set up by way of defence, in the first action, the contention raised on the motion; and, as stated, the two actions came down to trial together and were tried at the same time.

Although I intimated at the close of the evidence, and after hearing argument of counsel, that I had no doubt whatever as to the liability of the defendants and would reserve my judgment only upon the question of damages and upon the right on the part of the plaintiff to maintain both actions, yet I think I should state briefly the grounds upon which I hold the defendants liable.

The deceased, Violet Bowler, a young girl of about 18 or 19 years of age, was employed as a box-maker at Willard's factory in the vicinity of the scene of the accident. It was her custom to go from her work to the corner of Draper-street and Front-street and there take a west-bound street-car. On the evening of the 16th January, 1928, at about 20 minutes to 6 o'clock, Violet Bowler followed her usual practice and arrived at this corner with a number of other employees of her own and different factories. It had been a day of rain and sleet and snow, and, although it was not raining at this time, the streets were very icy. There is a street-light at the north-east corner of Draper-street and Front-

street and one at or near the north-west corner. There is also, a short distance east from Draper-street, on the devil-strip between the two tracks, a pole with a light on it reflected downwards shewing a red light towards the west.

Two street-cars proceeding westward appeared from the direction of Spadina-avenue. Violet Bowler and some dozen other persons stepped out to the roadway to board this car. The street-car, however, did not stop, but the second car was very close behind, some witnesses say not more than 50 feet, although it probably was farther. Violet Bowler and the others remained where they were, waiting for the second car, and it was at this instant that the accident occurred.

The defendant Blake, who was the driver of a truck owned by National Grocers Company Ltd., the other defendant, had been in the latter's employment for some time. He was an experienced driver, or should have been from the length of time he had been engaged in that occupation. He was driving a truck returning after his day's work to the company's garage. He was proceeding eastward on Front-street. The evidence indicates that the street-car tracks down to a point about midway between Stone-driveway and Angus-place, which is some distance west of Draper-street, are about in the centre of Front-street. From this point eastward, however, they run towards the south side of Front-street, and there is a concrete kerb which seems to have the effect of diverting traffic to the tracks themselves. At any rate Blake was on the southerly track of the street-car lines, and had been, no doubt, for a little distance before arriving at Draper-street. The lights of his truck, I find, were very defective. Some witnesses say they were not burning at all. I do not think it makes much difference whether they were or not. He states that the first street-car passed him going westerly and that immediately thereafter he turned north-eastward between the two street-cars at or very close to the corner of Draper-street and Front-street, and that, as he did so, a motor-car with glaring headlights passed him going westward. He admits that he knew that the corner of Draper-street and Front-street was a street-car stop. He could not fail to see the second street-car coming from the west. He should have known, therefore, that passengers were in all probability about to enter that street-car. Indeed he admits seeing passengers or people whom he took to be passengers, and who were in fact standing on the corner of Draper-street waiting for a street-car. Yet, knowing all these things and appreciating as he should have done that to turn in the direction in which he did with the intention of travelling eastward from that point on, would be, under the

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Garrow, J. conditions, extremely dangerous, he yet chose to do that very thing. I find on the evidence that there was an alternative road which he might have taken to the south of the car-tracks. His own evidence was to the effect that no car or truck could be driven over the roadway to the south. That is contradicted by the evidence of a brother of the deceased girl, which evidence I am inclined to accept. He says that that roadway to the south, although perhaps a little rough, would, in fact, under the weather conditions that existed on that evening, give better traction and be a better roadway, quite apart from the question of danger, than the roadway to the north.

Blake says he did not see the group of girls in which the deceased was until he was upon them. He did not blow his horn—perhaps it would not have done much good had he done so. He applied his brakes, and the rear of his truck swung and struck three of the girls and inflicted the injuries to the deceased which are complained of in these actions. His truck proceeded 40 or 50 feet west and came to a stop on the north side of the street.

All the witnesses called on behalf of the plaintiff say they saw nothing and heard nothing, although they looked until the truck was actually in their midst. It probably was hidden from their view by the first street-car. At any rate, they did not see it and could not see it and were given no warning.

The deceased was, I find, rightfully on the street waiting for a street-car. There was no other method by which she could gain access to the car except by standing where she did. There is no evidence whatever, in my opinion, in support of a contention as to any contributory negligence, and I find that the defendant Blake, as driver, and the company, as the owner, are liable for the consequences.

Then as to the other questions reserved, namely, the right, if such exists, to maintain both actions, and, if so, the damages recoverable in each.

It was contended by counsel for the defendants that upon the death of Violet Bowler the first action came to an end and that no relief remained open to her administratrix other than the relief provided by the Fatal Accidents Act, and in support of this contention Mr. Hughes relies upon the case of *McHugh v. Grand Trunk Railway Co.* (1901), 2 O.L.R. 600, and particularly upon the judgment of MacLennan, J.A., at p. 610, in which it was stated that "it is not conceivable that the Legislature intended that, in the case of wrongs followed by death, the wrongdoer should be subjected to two different actions by the same executors or administrator, and for the same wrong;" the learned Judge going on

to intimate that the proper interpretation to be put upon sec. 10 of the Trustee Act, now 37 of R.S.O. 1927, ch. 150, is to exclude from the operation of that section those cases in which death has been caused by the wrongful act. As I read this decision, the other Judges did not go the length of MacLennan, J.A., nor was it necessary for the purpose of the question involved. In the case there under consideration the deceased had died immediately following the wrongful act, and the only action brought was an action under the Fatal Accidents Act, and the question arose, before the action came to trial, whether upon the death of the sole beneficiary entitled to the benefit of any recovery that might be had in the action, the action itself came to an end, or whether it might be revived in the name of the personal representative of such sole beneficiary. It was held that the action came to an end and could not be revived for the benefit of the beneficiary's estate, nor could a new action be brought by the beneficiary's representative.

But to hold that where, as here, a person has been seriously injured, put to great expense, suffered much pain and discomfort, and, having brought an action to recover damages for these wrongs, dies as a result of the injuries before the action can be brought to trial—to hold that such an action cannot be revived in the name of the administrator of the deceased and that the injuries sustained and the pain suffered and the medical expense incurred are to be lost to the estate of the deceased, is, to my mind, to ignore entirely the very broad language of the section of the Trustee Act already referred to, which provides that, "except in cases of libel and slander, the executor or administrator of any deceased person may maintain an action for all torts or injuries to the person or to the property of the deceased in the same manner and with the same rights and remedies as the deceased would, if living, have been entitled to; and the damages when recovered shall form part of the personal estate of the deceased." See *Bradshaw v. Lancashire and Yorkshire Railway Co.* (1875), L.R. 10 C.P. 189; *Leggott v. Great Northern Railway Co.* (1876), 1 Q.B.D. 599.

It has been held that this statute was passed to prevent the wrongdoer escaping liability by reason of the death of the person injured, and not for the purpose of creating a new right of action: *England v. Lamb* (1918), 42 O.L.R. 60; *Mason v. Town of Peterborough* (1893), 20 A.R. 683. That being so, and the language of the section being as broad as it is, it appears to me that the personal representative of the deceased injured person is fully entitled to revive the action already brought and to recover all

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Garrow, J. the damages down to the date of death which the deceased herself could have recovered had her action been brought to trial at that date. I can see no reason for excluding from the assessment of damages an allowance for the physical injury done to the plaintiff and the pain and suffering which she was obliged to undergo for several months.

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The evidence indicates that this young girl was earning \$20 a week and was in steady employment. The accident occurred on the 16th January, 1928, and she died on the 5th May following, a period of about 15 weeks, during the whole of which time she was in the hospital. The doctor who attended her stated that, although she was partially paralysed for a time at least, she endured great pain and very much discomfort. The actual injury was a fracture of the 5th vertebra. Towards the end of her life she had to be constantly taken care of by a nurse. The actual bills paid were the following: \$945 to the hospital and for nursing, \$399.20 for additional nursing, Dr. Waddington \$300. It does not, to my mind, make much difference whether these bills were paid by the mother on a promise of the daughter to repay them. The mother is herself a party to the first action, and the bills were undoubtedly paid and ought to be included in the assessment of damages. There should perhaps be a deduction of the actual cost of the deceased's maintenance saved to her estate by reason of her having been maintained in the hospital during the last three months of her life. I would therefore allow by way of damages in the first action the following sums:—

Loss of wages for 15 weeks at \$20 a week	\$300.00
Physical injury to the deceased and pain and suffering	1,000.00
Hospital and nurses	1,342.20
Dr. Waddington's account	300.00
	—————
	\$2,942.20
Less \$6 a week, the actual cost of deceased's maintenance at home	90.00
	—————
	\$2,852.20

As to the action under the Fatal Accidents Act, the only beneficiary is the mother. She is 51 years of age and appears to be in a fair condition of health. The daughter was described by the doctor as being an exceptionally fine and attractive young woman in excellent health. She was, as already stated, 19 years of age. She was earning \$20 a week, and of that amount paid regularly to her mother every week the sum of, on the average, at least \$15 a

week. The evidence is that it cost the mother about \$6 a week to provide food and other necessities for the daughter, and that the balance of \$9 a week was what the mother could count upon as being contributed by her daughter to the upkeep and maintenance of the home. The daughter, although an attractive girl, was not engaged to be married, and did not appear, so far as the evidence disclosed, likely to marry for some time at least. She was very well disposed towards her mother. They were apparently on the friendliest terms, and there is nothing to indicate that the existing relationship between them and the reasonable expectations which the mother might have of continued financial assistance from her daughter should not exist for some time to come. On the other hand, of course, there is the possibility of the mother herself dying, or of the daughter having died from some other cause, or marrying, as well as all the other chances and changes of life. On the whole I think that a reasonable allowance to be made to the administratrix for the benefit of the mother would be \$1,200, which is a little more than the total receipts by the mother at the rate mentioned for a period of two and one-half years would have amounted to.

There will be judgment, therefore, for the sums mentioned with costs, but in regard to the latter I do not think there should be two sets of costs throughout. I am not at all clear that it was necessary to bring two separate actions. At any rate, I am of the opinion that they might have been properly consolidated at an early stage. In taxing the costs I think it would be proper that they should be taxed as if the actions had been consolidated upon the delivery of the statement of defence in the second action.

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[APPELLATE DIVISION.]

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RE ALMONTE BOARD OF EDUCATION AND TOWN OF ALMONTE.

Nov. 12.

Schools—Public and High Schools—Board of Education for Town—Alteration of Public School Building—Requisition upon Town Council to Levy Rate for—Intention to Use another Public School Building for High School Purposes—Powers of Board—Boards of Education Act and Public Schools Act—Right of Council to Refuse where Purpose Illegal—Application for Mandatory Order.

A school board or board of education has no power to levy rates for the purpose of carrying on its operations: it must make requisitions upon the municipal council to raise the money required as part of the general levy for municipal purposes. The council has no power to review the action of the requisitioning board in making the requisition or in determining upon the course of action which results

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in the expenditure which makes the requisition necessary. In all matters entrusted to the board its jurisdiction is supreme, and as to requisitions made for the resulting pecuniary obligation the council is used as a mere machine to levy the resulting tax.

But, if the board goes beyond its statutory jurisdiction, and does or contemplates doing something *ultra vires*, it has no right to demand the levying of a rate for such a purpose; and, if the council refuses to act, the Court will not grant a mandatory order.

The Board of Education for the Town of A. was a union board constituted under secs. 13 to 16 of the Boards of Education Act, R.S.O. 1927, ch. 327. It acquired all the property formerly vested in the High School Board and in the Public School Board, and was obliged to perform all the duties imposed upon a public school board or a high school board. The High School Board whose powers were vested in it was a board having jurisdiction over territory extending beyond the limits of the town and covering more than the public school section involved:—

Held, that the Board of Education did not function as two separate bodies, but as a new and separate corporate entity; nevertheless, the board must keep the financial affairs of the public school and the high school separate; for those who in the end pay for the maintenance of the public school are the public school supporters, and those who pay for the maintenance of the high school include not only the public school supporters but also the separate school supporters of the larger territory included in the high school district.

Sections 2 (4), 10, and 13 to 16 of the Boards of Education Act considered.

Where a demand was made upon the council for \$25,000 to be spent in repairing, improving, and enlarging one public school building in the town in order that it might serve as the sole public school for the town, another building erected and paid for by public school supporters being used for high school purposes only, and the intention being to charge the high school an adequate rental:—

Held, that this purpose of the board was not authorised by clause (s) or clause (v) of sec. 88 of the Public Schools Act, R.S.O. 1927, ch. 323, nor by any other statutory provision, and was *ultra vires* of the board.

The council was therefore justified in its refusal to levy a rate for the purpose indicated; and a mandatory order was properly refused by the Judge of first instance.

AN appeal by the Board of Education from an order of LOGIE, J., bearing date the 28th June, 1929, by which he dismissed the application of the Board for a mandatory order requiring the Mayor and Council of the Town of Almonte to submit to the electors a by-law for the borrowing of \$25,000 for the purpose of repairing and improving a school building in Church-street, in the town.

October 14. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

W. H. Stafford, K.C., and Grayson Smith, K.C., for the appellant board, contended that, when the town council refused to grant the money for public school purposes, it was incumbent upon that

body by virtue of the Public Schools Act, R.S.O. 1927, ch. 323, sec. 53, subsec. 3, to submit a by-law to the public school supporters in order to obtain their approval of the appropriation. The repairs and improvements to Church-street school are required in order to house all the public school pupils in Almonte in one building, and so provide a better educational system for them.

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G. F. Henderson, K.C., and R. A. Jamieson, for the town corporation, respondent, contended that, when the town council refused to grant the money to the appellant board, there was no duty upon the respondent to submit a by-law to the public school supporters for their approval. The right and duty of the town council is to inquire into the legality of the appropriation so far as to ascertain that it is for purposes *intra vires* the school board. If it is clearly for a purpose not within the powers of the board, it is the right and duty of the town council to reject it: *Erb v. Dresden Public School Board* (1909), 18 O.L.R. 295. The town council rightly refused to submit a by-law to the public school supporters, as the appellant board was asking public school supporters to grant the money for high school purposes. The intention of the appellant board is to house all the public school pupils in Almonte in Church-street school, thus leaving Martin-street school solely for high school purposes. The high school is maintained by both separate school supporters and public school supporters. Therefore the separate school supporters will be deriving a benefit, if this by-law is approved, without contributing any part of the money. A public school can only own and hold such land as is absolutely required by it: Public Schools Act, R.S.O. 1927, ch. 323, sec. 88 (s) and (v). A public school board may lease the surplus property temporarily but not permanently. The appropriation to repair and improve Church-street school is not necessary, as there is sufficient accommodation in the two schools to house all the children in Almonte, without building additional rooms. Therefore it would be necessary for the appellant board to dispose of Martin-street school, for which there is no available market. Reference to the Boards of Education Act, R.S.O. 1927, ch. 327, secs. 10 and 14; *Re Athens High School Board and Township of Rear of Yonge and Escott* (1913), 29 O.L.R. 360; *Board of Education of the City of London v. City of London* (1901), 1 O.L.R. 284. *Toronto Public School Board v. City of Toronto* (1902), 4 O.L.R. 468.

November 12. MIDDLETON, J.A.:—By the terms of the formal order issued, the application for the mandatory order was dismissed, but the parties were directed to proceed to the trial of an issue to

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1929. order sought. This order was contradictory in its provisions, and
upon the attention of counsel being drawn to the fact it was agreed
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BOARD OF out of the order and that the appeal should be heard as though
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AND neither party desiring to supplement the material before the
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As part of the scheme of municipal government in this Province various boards are established having plenary power in respect of matters mentioned in the several statutes creating them. These boards are given the power of spending money in the carrying on of their operations. Instead of conferring upon such boards the power of levying rates to meet their requirements, they are directed to make requisitions upon the municipal council to raise the money required as part of the general levy for municipal purposes.

It is now established law that this does not confer upon the municipal council any power to review the action of the requisitioning board in making the requisition or in determining upon the course of action which results in the expenditure which makes the requisition necessary. In all matters entrusted to the board its jurisdiction is supreme, and as to requisitions made for the resulting pecuniary obligation the municipal council is used as a mere machine to levy the resulting tax.

If, however, the board goes beyond its statutory jurisdiction, and does or contemplates doing something *ultra vires*, it has no right to demand the levying of a rate for such a purpose, and, if the municipal council refuses to act, the Court will not grant a mandatory order. A council is justified in making such inquiry as is necessary to assure it that the demand is made for a purpose within the jurisdiction of the demanding board, and when a mandatory order is sought the Court will stay its hand if it appears that the purpose for which the money is sought is not within the statutory powers of the applicant.

Seeking to apply this to the present case, the facts appear to be simple and uncontradicted. The Board of Education, functioning under the provisions of the Boards of Education Act, R.S.O. 1927, ch. 327, acquires all the property formerly vested in the High School Board and in the Public School Board (sec. 2, subsec. (4)), and has "all the powers" and shall "perform all the duties . . . conferred or imposed upon a public school board, or a high school board" (see secs. 10 and 14). But a member of a board who is a separate school supporter, or who is appointed by the

county council, shall not take part in any of the proceedings relating exclusively to public schools (sec. 22).

The Board of Education for Almonte is a union board constituted under secs. 13 to 16 of the statute. The High School Board, whose powers are vested in it, was a board having jurisdiction over territory extending beyond the limits of the Town of Almonte and covering much more than the public school section involved.

I cannot at all agree with the view put forward by Mr. Henderson that the Board of Education functions as two separate bodies, the Public School Board and the High School Board. Upon its formation the powers of these two boards became vested in it, and all the property of the boards was in like manner vested in it (sec. 2 (4)), and thereafter it must function as a new and separate corporate entity. But this does not seem to me material, for the board must keep the financial affairs of the public school and of the high school separate; for those who in the end pay for the maintenance of the public school are the public school supporters resident in the school section, and those who pay for the maintenance of the high school include not only the public school supporters but also the separate school supporters of that larger territory included in the high school district.

The demand now made is for \$25,000 to be spent, first, in repairing and improving the present Church-street school, and, secondly, in the erection of a large extension to that school. There are in Almonte two school buildings, the school in question and a school known as the Martin-street school. Both of these are public school buildings erected and paid for by public school supporters. Part of the Martin-street school, which is a comparatively new and up-to-date building in good repair, is now used for high school purposes, and a "rental" of \$2,400 per annum is charged to the high school for this and credited to the public school. It is said by the mayor, on the strength of statements made by the chairman of the Board of Education at a conference between the board and the council relating to the matters in question, and this is not in any way contradicted, that what is now intended by the board is so to enlarge the Church-street school that it will suffice for all public school pupils and to leave the Martin-street school available for the high school, which alone will be carried on there. The effect of this will be to make the public school supporters in the Almonte area pay for the building to accommodate the high school. It is true that the intention is to charge the high school an adequate rental, but I cannot find in the statute any suggestion that a public school board may become a landlord and lease pro-

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property to another body, even though it might be shewn that as a business transaction an individual landlord would regard it as prudent if he stood in the place of the public school board.

A public school board is authorised "to dispose by sale or otherwise" of a site or property not required and to apply the proceeds thereof for school purposes. A leasing of surplus property does not, it seems to me, come within this clause (sec. 88 (s) of the Public Schools Act, R.S.O. 1927, ch. 323). See *Astley v. Manchester Sheffield and Lincolnshire Railway Co.* (1858), 2 De G. & J. 453, which indicates that the power to dispose of property means to transfer the title to another, and that this power does not cover the mere use of the property for a purpose different from that for which it was acquired.

But, even if the statute referred to does give the right to lease, the difficulty here is rooted far deeper. The Martin-street school is not being dealt with in the scheme proposed as a matter of public school policy, but so as to leave it available for use as a high school building; but what the board is seeking to do is to provide a high school building, even though this may operate to the advantage of the public school supporters, by reason of the rental which it is proposed to charge.

The Board of Education is in a difficult situation. It is endeavouring to serve two masters, and, unfortunately for it, this traditionally difficult task does not seem to have been contemplated by the statute. There is much to gain by having the educational policy of a town in the hands of one board, but where the accounts of the public school and of the high school are necessarily to be kept separate, as the funds come from separate although overlapping bodies, it is of importance to see that power is given to the governing body to enter into transactions by which the rights of those separate classes of ratepayers are to be affected. I can find no such power given to the board. It cannot be both landlord and tenant and agree with itself as to the rent to be paid. It cannot be both vendor and purchaser and fix the price that is to be paid. The whole scheme propounded may be the most prudent and reasonable possible in the interests of both sets of ratepayers, but I cannot see that any power is given to this board to represent both bodies in a transaction in which bargain and negotiation are essential elements. There is much to suggest that a gross injustice is being done the public school supporters. If the Church-street school is enlarged and remodelled so as to accommodate all the public school children, I can see no reason why the existing school, which will not then be needed for public school purposes, should not be sold and the proceeds applied in payment of the debt.

I can see no justification for saddling the public school supporters with a large debt incurred in reality to provide accommodation for the high school.

It may well be that in this case and in other cases it would be prudent as a matter of business to sell an existing school building to another school board, but to enable a board of education to deal with such a situation as that which here arises further legislation is apparently necessary.

It was very feebly suggested upon the argument that this case might be brought under sec. 88(v), which gives to the board power "to permit the school house and premises to be used for any educational or other lawful purposes which may be deemed proper, provided the proper conduct of the school is not interfered with." What is here sought is clearly not within the ambit of that section. It contemplates a temporary use of a school building "for educational or other lawful purposes" during the time in which it is not used for a school purpose. This is indicated by the last words of the clause, "provided the proper conduct of the school is not interfered with." It contemplates permission being granted by the trustees for the use of the school building for lectures, concerts, and other kindred temporary purposes.

In the result, I think the order refusing the mandamus should be affirmed with costs to be paid by the board to the council forthwith, out of high school funds.

MULOCK, C.J.O., and MAGEE and GRANT, J.J.A., agreed with MIDDLETON, J.A.

HODGINS, J.A.:—One of the reasons for merging the Public and High School Boards into a Board of Education was, I venture to think, that the local educational authority would be in a position thoroughly and completely to understand the needs of the extensive field of primary and secondary education, which they had to administer as a whole. Provision for a representative or representatives of the separate schools upon the new board as members surmounted any difficulty arising from the different classes of rate-payers or from the different territories under the care of the board. By the Boards of Education Act, R.S.O. 1927, ch. 327, all the property of the boards which it superseded was vested in the new body, and it became liable for all the debts, contracts and agreements, for which its predecessors were responsible.

In addition, by sec. 10 of that Act it was declared that the board should have and possess all the powers and should perform all the duties which by that Act or by any other Act are conferred

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or imposed upon a public school board or a high school board. The Board of Education was thus entrusted with powers which enable it in effect to administer two Acts which deal with two separate classes of ratepayers, occupying different territories and differently rated, and with regard to distinct classes of pupils. In performing its duties it had necessarily to have respect to the property and rights of each separate class which it represented, including of course the administration and use of the buildings and equipment vested in them for either high or public school purposes.

From the foregoing I think it is clear that, while the Board of Education was and is empowered and required to do all that either or both of the old boards could do, including the collection and use of all information required adequately to perform the duty of providing public and high school accommodation and education, it is limited in the exercise of its powers by the Acts in which its public and high school functions are outlined, when dealing with property owned by one or other of the boards which it superseded.

The facts are simple and undisputed. The Board of Education of Almonte owned two schools formerly belonging to the Public School Board, and was empowered to use them for the education of public school pupils, as they had been erected or owned by the Public School Board before the fusion.

The board conceived the idea that it would be a good move to enlarge and repair one school so as to take in all public school pupils, thus leaving the other to be used for high school pupils.

It was, of course, entitled, and I think bound, to survey the needs of both public and high school pupils and to consider what was the best course to pursue in regard to accommodation for both classes, but it could only accomplish what it had decided upon if it was within the powers conferred on the board by either of the Acts referred to. Having arrived at its conclusions as a board, it informed the municipal council of its wishes and intentions. No suggestions of want of good faith can be attributed to the Board. Its members were frank and above-board, and only contemplated what they thought it was their right and duty to do.

But I cannot reconcile with the provisions of any of the statutes applicable to this case, or with my view of the duties of a public educational authority, the idea that such an authority as the board could, in performing its statutory duties, use public school property for the education of pupils of any other class than that for which it was intended. It cannot treat itself as a landlord of such a property for the purpose of renting it, for educational purposes other than those of public schools.

Section 88 (s) and (v) of the Public Schools Act, R.S.O. 1927, ch. 323, makes this clear. The board's duty is to dispose of public school property not needed for use for public school purposes. Consequently, while I conclude that the raising of the money required for the repair and alteration of or the addition to the Church-street school would properly be within its powers, the scheme of which it is a part cannot be carried through because the board has no power to lease the Martin-street school for high school purposes. That would in effect tie up an investment of the public school ratepayers and force them to raise further money, instead of realising by sale the value of the school they do not need in order to pay for the enlargement of the other.

The mandamus must therefore be refused and the appeal dismissed with costs, solely because, recognising good faith and even assuming good business judgment, there is a legal bar to a vital part of the scheme which prevents it being carried out in the way proposed.

Appeal dismissed.

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[APPELLATE DIVISION.]

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April 27.
Nov. 12.

Easement—Mutual Right of Way over Strip of Land between Adjoining House Properties—Grant of Easement—Non-user of Part of Strip for a Time—Whether Easement Extinguished by Abandonment—Evidence—Title by Possession to Part of Strip—Failure to Establish.

A mutual right of way was established in the years 1907 and 1908, by grants conveying adjoining parcels of land respectively to the predecessors in title of the plaintiff and defendant, covering 5 feet in width of one parcel and 2 feet in width of the other, extending from the westerly limit of a street westerly for 75 feet. There was no dispute regarding the easterly 60 feet from the street-line, but only as to the westerly 15 feet, as to which the defendant alleged that the plaintiff's right of way had been abandoned. The defendant, with respect to a small triangular portion of the 15 feet, set up that she had acquired an absolute title in fee simple by possession:

Held, that the evidence (in some respects conflicting) did not justify the inference that the right of way had been abandoned, although it was at first used by the defendant or her predecessor only.

Swan v. Sinclair, [1925] A.C. 227, distinguished.

And held, that no such evidence of continuous, adverse, and exclusive possession of the triangular piece had been adduced as would support the defendant's claim to title by possession.

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ACTION to establish a right of way and to restrain the defendant from interfering with the plaintiff's user of it.

The action and a counterclaim were tried before KELLY, J., without a jury, at a Toronto sittings.

Shirley Denison, K.C., and *R. F. Wilson*, for the plaintiff.
A. E. Knox and *J. R. O'Connor*, for the defendant.

April 27. KELLY, J.:—The plaintiff is the owner of house and premises No. 152 on the west side of Close-avenue, in Toronto; the defendant is the owner of house and premises No. 148 on Close-avenue, immediately adjoining the plaintiff's property on the south. In 1907 the lands constituting these properties were in the same common owner, J.S. Case. In that year Case made a conveyance to the plaintiff's predecessor in title of what is now the plaintiff's property, and on the 11th October, 1908, he made a conveyance to the defendant's predecessor in title of what is now the defendant's property. In these conveyances and in every subsequent conveyance of each of these properties, down to and including the conveyance of No. 148 to the defendant's husband (now deceased) in September, 1914, and the conveyance of No. 152 to the plaintiff in August, 1919, there is contained a grant of what has been referred to as a mutual right of way over the northerly 5 feet of the defendant's lands and the southerly 2 feet of the plaintiff's lands to a depth in each case of 75 feet from the westerly limit of Close-avenue. At and prior to these last mentioned conveyances there was a gate across the right of way at a distance of about 60 feet from the westerly limit of Close-avenue, and a fence ran from the line of the gateway westerly to the rear limit of the properties, intended to be on the dividing line between the two properties, but which was not, throughout its whole length, exactly upon this dividing line as defined by the descriptions in the conveyances. The defendant has used the gateway as access over the mutual right of way to the rear portion of her lands, such use being mainly, if not solely, for her motor-car. The plaintiff in the early years of her ownership, in so far as concerned access to her property, used the right of way only as far as the side-door leading into her house at a point approximately half-way from the street-line to the gate. During that time she had no occasion to use any other part of the right of way as a means of access to her house or her rear premises. There came a time however, in 1925 I believe, when she had occasion to use the right of way to a greater depth, and she made alterations by which she could enter her premises at a point immediately to the east of the gateway and

directly opposite a side-door in the extension of her house. This alteration was all that was necessary to give her direct access from the right of way to this side-door, as well as into the premises to the rear of her dwelling house. She has since this alteration uninterruptedly used this means of access to her premises as well as the right of way itself as far as the gate for that purpose; and until shortly prior to the disagreement which resulted in this action she had no occasion, in order to enter her premises, to use the portion of the right of way to the west of the gate. Then, however, contemplating acquiring a motor-car, there was in prospect the occasion and the necessity of using the right of way to its full depth of 75 feet as a means of access for the car to her rear premises. The division-fence between the properties having fallen about the end of 1927, when the question of replacing it arose, the plaintiff's husband, representing her, proposed the construction of a concrete *via trita* along the division-line between the rear portions of the properties for the common use and mutual accommodation of the parties. The defendant objected, and, against the plaintiff's forcible objection, had the division-fence rebuilt. This action followed, in which the defendant sets up that the plaintiff has lost, by abandonment or otherwise, her right to use as a right of way any portion of the mutual right of way described in the deeds which lies to the west of the gate.

There is no evidence whatever of any written or express grant, release, surrender, or abandonment of that right by the plaintiff or those through whom she claims; and, therefore, the defendant cannot succeed unless, from the circumstances or from the conduct or actions of the plaintiff, such release, surrender, or abandonment can be reasonably inferred. There was, as I have pointed out, no occasion for the plaintiff to use the right of way to a greater extent than she did use it down to the time when the necessity arose of further use for the motor-car which was about to be acquired. Relationship between the plaintiff and defendant and their families had been friendly and familiar; the defendant was aware of the contemplated purchase by the plaintiff's husband of the motor-car which would necessitate using the mutual right of way throughout its length if the car were to be kept, as was intended, on the plaintiff's premises; but no objection was made until the trouble arose over the erection of the fence, in the spring of 1928. A car was purchased; Baker's evidence would lead me to believe that he purchased it; while his nephew, Bélanger, a member of the Baker household and residing with the plaintiff, swears he purchased it. However that may be, the car belonged to or was under the control of some member of the plaintiff's

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household, and it would be natural to expect it to be kept on the plaintiff's premises if there was access thereto.

In respect of the extinguishment of an easement there is a marked distinction between easements the title to which has been perfected by the existence of an actual grant, and easements the title to which remains imperfect, but a right to which is capable of establishment under the doctrine of prescription. Extinguishment by release may be effected either by express release or by circumstances occurring from which a release must be presumed. Where the title to an easement has been perfected, an extinguishment by release can rarely be effected in any other manner than by an express release, or by circumstances so cogent as to preclude a quasi-releasor from denying the release. The extinguishment of an easement by implied release must be based upon the presumed intention of the dominant owner. It is a question of fact whether an act amounts to abandonment or was intended as such. The intention to release an easement will be less readily presumed where the title to the easement has been perfected than where the title still remains inchoate, and it will be less readily presumed from non-user in the case of negative easements, where they are acquired by mere occupancy, than in the case of positive easements acquired by actual physical user. In no case, whether the title to an easement has been perfected or not, or whether the easement is negative or positive, will mere non-user of a right alone cause extinguishment; for the suspension of the exercise of a right is not sufficient to prove an intention to abandon it. There must be other circumstances in the case to raise a presumption of intention to abandon. There is no hard and fast rule that 20 years' non-user raises even a *prima facie* presumption of a release. The cesser in the exercise of the right may, moreover, be explained in such a manner that the non-user will not affect the question of abandonment in the least, if, that is, it can be shewn to have been due to some sufficient cause other than an apparent intention of the dominant owner to abandon his right.

These are general principles, applicable to a situation such as the present, laid down in vol. 11 of Halsbury's Laws of England, at pp. 276 to 280 inclusive, supported by a long line of decisions in cases there cited, such as *Regina v. Chorley* (1848), 12 Q.B. 515; *Ward v. Ward* (1852), 7 Ex. 838; *Crossley & Sons Ltd. v. Lightowler* (1867), L.R. 2 Ch. 478; *James v. Stevenson*, [1893] A.C. 162 (P.C.). This latter case I specially refer to, as it deals with the manner of user by a servient owner of land comprising a right of way. The substance of the decision therein on this point is summarised in the head-note—that, abandonment being

a question of intention, non-user by the respondents (who brought the action to assert a right of way which had been granted by the appellant's predecessor by deed in 1839 over his land, the appellant pleading abandonment), coupled with user by the appellant for farm purposes of portions of the land subject to the easement, when the easement was not required, could not prove an abandonment of the entire right, and was inconclusive to prove an abandonment of portions thereof. Sir Edward Fry, in his reasons, referring to the *Crossley* case, said that abandonment is a question of intention to be decided upon the facts of each particular case; and that it is one thing not to assert an intention to use a way, and another to assert an intention to abandon it. The present case resembles the *James* case, inasmuch as in each the party asserting a right to the entire right of way used an important part of it without disturbance, a fact which Sir Edward Fry regarded as of importance in determining whether there was abandonment of the portions which had not been used. There is here an additional factor which adds strength to the plaintiff's position as compared with that of the successful respondents, in the *James* case. From the conveyance of the plaintiff's property by Case in June, 1907, in which this right of way was first created and defined in writing, until and including the conveyance to the plaintiff in August, 1919, each of the several successive registered conveyances of the plaintiff's property contains a grant of this right of way; and similarly each of the registered conveyances of the defendant's property, beginning with Case's conveyance thereof in October, 1908, and down to and including the conveyance to the defendant's husband in 1914, similarly sets out the right of way. As a matter of law this is not without effect and should not be overlooked.

In view of the conclusion which in my opinion must follow from the foregoing, it is perhaps unnecessary to refer to the manner of user of the portion of the right of way to the west of the gate. Apart from its use for the defendant's car, it was not in use for any other special purpose. Members of the defendant's family went upon it; so, too, did members of the plaintiff's family at times. Then the relationship between the two families was friendly. The point, however, is that in respect of that use there was nothing by which abandonment or surrender by the plaintiff can be inferred.

There was no abandonment or surrender by the plaintiff of her right to use the right of way as it is set forth in the conveyances of the property; and she is entitled to such use and to the removal by the defendant of any obstruction placed by the latter

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upon it; and the defendant should be restrained from further obstructing it.

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The plaintiff sustained some damage in consequence of being deprived of the use of this part of the right of way from the time she desired to use it. Some outlay was occasioned by being prevented from keeping the car on her premises, and there was other inconvenience, the evidence of the extent of which, however, is not definite. On the whole, \$50, in my opinion, would represent the damages sworn to.

The counterclaim is so bound up in and so dependent upon the disposal of the plaintiff's claim that the plaintiff's success on her claim means failure by the defendant on the counterclaim. Whatever possession the defendant has had of the strip of land referred to in the counterclaim was as part of the right of way given her by the conveyances and subject to the plaintiff's title and rights.

The plaintiff is entitled to the costs of the action and counter-claim.

The defendant appealed from the judgment of KELLY, J.

September 19. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A.

G. W. Mason, K.C., for the appellant, contended that the plaintiff had lost any right of way contained in the express grant to him and that the appellant had acquired a possessory title to the triangular 2-foot strip enclosed by the fences erected. In 1907 a fence with a gateway was erected, which completely closed the portion of the way west of a point about 54 feet from Close-avenue. The actual continued existence of the fence for a period of 20 years was inconsistent with the free exercise by the plaintiff of his right of way and was sufficient to be construed as an abandonment of his right. There was non-user, together with acquiescence in the condition. Although the gate was in fact not continuously closed and locked, even when it was not locked there was no user of it by the plaintiff, and that circumstance is material. With regard to the triangular strip, the appellant is acquiring title to the fee and not to the right of way and therefore 10 years' possession is sufficient. Reference to *Swan v. Sinclair*, [1925] A.C. 227; *Liscombe v. Maughan* (1928), 62 O.L.R. 328; *Nantais v. Pazner* (1926), 59 O.L.R. 318; *Closs v. Ferguson* (1923), 24 O.W.N. 199; *Bell v. Golding* (1896), 23 A.R. 485; Goddard's Law of Easements, 8th ed., pp. 522-525.

R. F. Wilson, for the plaintiff, respondent. The evidence discloses that the gate in question was closed very little until the trouble between the parties started. The evidence also shews clearly that there was no abandonment in fact by the plaintiff and that the right of way was used at all times. Reference to Halsbury's Laws of England, vol. 11, p. 278, para. 552: *James v. Stevenson*, [1893] A.C. 162.

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November 12. The judgment of the Court was read by GRANT, J.A.:—This is an appeal from the judgment of Kelly, J., pronounced on the 27th day of April, 1929, in an action seeking to establish a right of way and to restrain the defendant from interfering with the plaintiff's user and enjoyment thereof. The plaintiff's claim was upheld by the learned trial Judge. As the material facts are set out in his reasons for judgment, they need not be repeated here.

The right of way was established by grants in the years 1907 and 1908, whereby the two adjoining properties were conveyed respectively to the predecessors in title of the plaintiff and defendant, covering 5 feet in width of one parcel and 2 feet in width of the other. The strip or strips of land covered by the mutual right of way extended from the westerly limit of Close-avenue westerly for a distance of 75 feet. There is no dispute regarding the easterly 60 feet from the street-line, but only as to the westerly 15 feet approximately, with respect to which the defendant alleges that the plaintiff's right of way had been abandoned. The defendant further sets up, with respect to a small triangular portion of the westerly 15 feet above mentioned, that she has acquired an absolute title in fee simple by possession.

Dealing first with the contention that the plaintiff's right has been lost by abandonment, the law bearing upon the question of what is necessary to establish abandonment by non-user was dealt with by this Court in *Liscombe v. Maughan*, 62 O.L.R. 328, which followed *Closs v. Ferguson*, 24 O.W.N. 199, and need not be restated.

When the right of way was established in respect of the two properties, a fence and gate were erected at and from a point approximately 60 feet back from the street-line, and it is manifest from the evidence of J. S. Case, who was owner of one of the properties, that a mutual right of way was then established by agreement between his brother and himself, although at that time it was being used by him only, as his brother did not keep a horse and buggy, the intention being that the right of way would be available for the benefit of any subsequent purchasers or owners of the respective properties. It is further of interest to note that,

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in and by several conveyances which appear in the chain of title from 1907 down to 1919, the right of way is expressly granted. These features of the matter, while probably not of a conclusive character, yet are entitled to weight, as indicating an absence of intention to abandon the right of way. However that may be, the evidence adduced, which was in some respects conflicting, and upon which an experienced and able trial Judge has made his findings, did not in his opinion justify the inference that the right of way had been abandoned. In this conclusion we entirely concur.

Counsel for the appellant relied upon the decision of the House of Lords in *Swan v. Sinclair*, [1925] A.C. 227. A perusal of the report of that decision makes it abundantly manifest that the judgment of the Law Lords was based upon a very peculiar state of facts, and that it did not purport to alter in any respect the well-established law bearing upon the abandonment, by non-user, of an easement. In our opinion, by reason of the peculiar state of facts upon which that decision was pronounced, *Swan v. Sinclair* cannot be relied upon as an authority supporting the appellant's position. As was stated by the then Lord Chancellor (p. 237): "The effect of the transaction was at the most to create a contractual relation between the several purchasers and the vendors" (of certain adjoining parcels of land disposed of under conditions of sale) "under which the purchasers might perhaps have been called upon, within a reasonable time after the execution of the conveyances and the determination of the existing tenancies, to clear the land and form the road; but until that had been done there could be no effectual creation of the easement of passage. In these circumstances it appears to me that the lapse of time is fatal to the appellant's claim. For the period of fifty years or thereabouts no person sought to enforce the contract, if contract there was, or to enter upon the enjoyment of the easement." This phase of the matter is dealt with by other members of the Court on pp. 240, 241, 242, and 245. It is apparent, from a perusal of the opinions expressed by their Lordships, that, in their judgment, no right of way had actually been created, but at most the right, within a reasonable time, to call for its creation, and that acquiescence in the existing condition of the property for a period of 50 years, coupled with certain other acts and user of a portion of it, justified the Court in inferring an intention by the parties to abandon such right. As already stated, we do not think the decision assists the defendant.

With regard to the defendant's claim of title acquired by possession with respect to the small triangular piece of the mutual

right of way, we are of opinion that no such evidence of continuous, adverse, and exclusive possession has been adduced as would be necessary to support such contention.

We are therefore of opinion that the decision of the learned trial Judge was right and should be affirmed, and that this appeal should be dismissed with costs.

Appeal dismissed.

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WYDRICK v. SALTFLEET AND BINBROOK MUTUAL FIRE
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Nov. 12.

Insurance (Fire)—Destruction of Barn on Farm—Vacant or Unoccupied Premises—Changes in Property Material to Risk—Removal of Stalls from Barn—Removal of Dwelling House from Proximity to Barn—Changes External to Building Insured—Departure of Insured Leaving no one on Premises—Failure to Notify Insurers—Rate of Premium.

To an action upon a fire insurance policy in respect of the destruction by fire of a barn upon the plaintiff's farm, the principal defences were that the property was vacant or unoccupied for a period exceeding 30 consecutive days, and that changes material to the risk had been effected, without notice to the defendants. The Judge who tried the action without a jury found against these defences; but, as there was no controversy as to the actual circumstances bearing upon the questions of vacancy and changes, the findings were in fact inferences drawn from, or constructions placed upon, admitted facts, and were not based upon the credit to be given to conflicting testimony; and the Court, upon appeal, being in as good a position as the trial Judge to draw the inferences and to determine the questions involved, reversed the findings and dismissed the action, holding:—

- (1) That the removal of four stalls from the barn did not constitute a change material to the risk.
- (2) That the removal of the farm dwelling house from the neighbourhood of the barn, leaving the barn near a side-road not much travelled, and the removal of the plaintiff and his family from the farm, leaving no one actually living in the house at the time of the fire, the farm having been leased to a neighbour, who lived upon his own farm, were changes material to the risk, within the meaning of a condition in the policy; and, no notice thereof having been given to the defendants, the contract was voided.

The material change which, in the absence of notice, may avoid the policy, may be external to the building insured, provided that the change is one effected by the insured or with his consent.

The rate of premium is only one of the factors which go to determine the materiality of the changes; the defendants were entitled to be informed of the changes, and, in the light of the changed circumstances, to determine whether or not they would continue the insurance in force, and at the same or at an increased premium rate.

In view of the result of the material change, it was unnecessary to determine the question as to vacancy.

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AN appeal by the defendants from the judgment of the County Court of the County of Wentworth (EVANS, Co. C.J.), in favour of the plaintiff for the recovery of \$300 in an action upon a fire insurance policy in respect of the destruction by fire of a barn upon his farm.

September 29. The appeal was heard by MULOCK, C.J.O., MAGEE, MIDDLETON, and GRANT, J.J.A.

F. R. Murgatroyd, for the appellants. The property is described in the policy as being occupied by the insured. When the insured moved from the farm to the city there was a change material to the risk which avoided the policy. The learned trial Judge erred in not so finding. The risk is joint and several. It was undertaken on the farm occupied as a going concern. This was not the condition of the farm at the time the loss occurred. Reference to *Robinson v. Briggs* (1870), L.R. 6 Ex. 1; *Abrahams v. Agricultural Mutual Assurance Association* (1876), 40 U.C.R. 175; *Boardman v. North Waterloo Insurance Co.*, *Spahr v. North Waterloo Insurance Co.* (1900), 31 O.R. 525; *Sun Insurance Office v. Roy*, [1927] S.C.R. 8; *Cooper v. Toronto Casualty Insurance Co.* (1928), 62 O.L.R. 311.

F. F. Treleaven, for the plaintiff, respondent. The premises were not vacant or unoccupied for a period of 30 days; they were visited every week by the insured and his family. The onus is on the appellants to prove vacancy for the stipulated period. This onus has not been discharged. There was no change material to the risk by the removal of the house from proximity to the destroyed barn to the other end of the farm near another barn. Reference to annotation on "Effect of Vacancy in Fire Insurance Risks," by F. J. Laverty, K.C., 46 D.L.R. p. 15.

November 12. The judgment of the Court was read by GRANT, J.A.:—This was an appeal from the decision of Evans, Judge of the County Court of the County of Wentworth, pronounced on the 20th June, 1929, whereby the plaintiff was given judgment against the defendant company for the sum of \$300 (together with costs) by way of insurance for loss sustained by the destruction by fire of a barn, the property of the plaintiff.

The principal grounds of defence to the action were, that the property was vacant or unoccupied for a period exceeding 30 consecutive days, and that changes material to the risk had taken place or been effected, without notice thereof being given to the insurance company. The learned trial Judge found as a fact that the property was not vacant or unoccupied for more than 30 consecu-

tive days within the meaning of the statutory provisions endorsed on the policy; and also "that no change material to the risk within the meaning of the statutory conditions, . . . had taken place during the life of the policy."

As there was no controversy between the parties as to the actual circumstances bearing upon the questions of vacancy and changes material to the risk, the findings of the trial Judge upon these points were in the nature of inferences drawn from, or constructions placed upon, admitted facts. An appellate court is therefore in as good a position to draw the inferences and to determine the questions involved as was the learned trial Judge.

One of the changes alleged to have been made, and relied upon as material to the risk, was the alleged removal of flooring, granary, mow, and stalls from the barn which was destroyed by fire. The onus of establishing such removal, subsequent to the placing of the insurance, rested upon the defendant insurance company, and the evidence adduced to prove the removal is not at all satisfying. The plaintiff acknowledged that he took out some stalls, but denied the removal of anything else from the interior of the building. To one who is familiar with conditions through the rural part of this Province, it is idle to contend that the removal of stalls from a barn building would leave it any less a barn than it was before such removal. In many farm buildings in Ontario, the upper portion is used for barn purposes and the lower portion for stabling; but, on the other hand, many farmers have their stables entirely separate from their barn buildings, and I would not be prepared to hold that the mere removal of four stalls would constitute a change material to the risk. The other alleged removals were not satisfactorily established.

A brief statement of some of the material facts is necessary to an understanding of the decision upon the other matters involved in the appeal.

The plaintiff had been carrying on farming operations on the property in question, which was situate in the township of Saltfleet, in the county of Wentworth. Upon the property were a dwelling house and three frame barns, referred to in the policy as barns numbers 1, 2, and 3, barn number 1 being the one which was burnt. When the insurance was effected, the house and barn number 1 were situated on the rear portion of the farm and close to a side-road, which was not much travelled. Barn number 2 was at the other end of the farm and situated within a few feet of a much travelled main highway. The dwelling house, which stood about 80 feet distant from barn number 1, was occupied by the plaintiff and his family, the plaintiff being at that time engaged in the

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operation of the farm. The policy appears to have been issued on the 6th June, 1927, although the term covered thereby extended from the 28th May, 1926, to the 28th May, 1929, and the application for the insurance was dated on the 28th May, 1926, and is endorsed as approved on the 18th June, 1926.

At some time in the year 1927, the plaintiff moved the house from the position which it occupied, being about 80 feet distant from barn number 1 and near the side-road, to a position about half a mile distant from barn number 1 and near barn number 2, close to the main travelled highway.

Then further, in July, 1928, the plaintiff, having made a lease of the farm to a neighbour, one Passmore, moved his family into the city of Hamilton, where they took up residence. Their furniture apparently was left in the house on the farm, but the house was not occupied in any other sense or manner. The plaintiff and members of his family went out to the property each Saturday afternoon during the summer and early fall of 1928 to look after a garden which he had planted on the property, but neither he nor his family appears to have gone upon the property for any other purpose from July until the month of October, 1928, when the barn was destroyed by fire.

Upon the above facts, the defendant company asks the Court to conclude that the premises were "unoccupied" within the meaning of the policy, and that changes material to the risk had been effected, and that upon both grounds the insurance contract had been voided. It is not suggested that any notice was given to the defendant company of the letting of the premises, the moving of the plaintiff and his family to Hamilton, or of the removal of the dwelling house.

No evidence was given as to the cause of the fire by which barn No. 1 was destroyed, nor is any explanation suggested other than that it was probably caused by some tramp or tramps as a result of their smoking in the barn or by the dropping of a match or in some similar manner. There were, according to the evidence of the plaintiff, two loads of straw in the barn, and as it was located on a side-road, upon which there was very little traffic, and as the nearest occupied house, that of Passmore, the neighbour, was approximately three-quarters of a mile distant, the tramp suggestion seems to afford the most probable explanation.

The question whether, under the circumstances, the house or premises generally are to be deemed to have been "vacant" or "unoccupied" within the meaning of the conditions of the policy, is one of some difficulty, but in the view which I take with respect to the other ground of defence, namely, that there was a change

material to the risk, of which no notice was given to the insurer, it is not necessary, in the present case, to determine the question as to vacancy.

Whether what was done in this case effected a change "material to the risk," within the meaning of the condition of the policy, is a question of fact. Where a jury has found that there was no change having such an effect, the Court is not disposed to disturb the jury's finding, if there be any evidence in support of it. But an appellate court is in a different position with respect to a finding of fact by a Judge, sitting without a jury, and especially where his finding is not based upon the credit to be given to conflicting testimony. *Vide Wilson v. Kinnear*, [1925] 2 D.L.R. 641, at the top of p. 646 (Lord Dunedin delivering the judgment of the Judicial Committee); *Mersey Docks and Harbour Board v. Procter*, [1923] A.C. 253 (Viscount Cave, L.C., at p. 258); *W. C. MacDonald Regd. v. Latimer, Jasperson v. Plumb* (1928), 63 O.L.R. 43 (Lord Atkin delivering the judgment of the Judicial Committee at p. 48).

In the case at bar, the only evidence adduced upon this point was given by Mr. Fletcher, the president of the defendant company, and was wholly to the effect that the risk was increased by what had been done. (Evidence, pp. 33, 34, top of p. 36, and p. 38, where reference is made to the increase of risk from tramps sleeping in barns which are isolated and are not under the supervision of a resident owner).

There is authority for the proposition that vacancy only will not, *per se*, be deemed to be a change so material to the risk as to vitiate the policy. *Vide Boyd, C., in Boardman v. North Waterloo Insurance Co., Spahr v. North Waterloo Insurance Co.*, 31 O.R. 525, at p. 526, affirmed by a Divisional Court, at p. 529.

It may also be open to question whether, upon the proper construction of the whole written contract of insurance, inasmuch as a special clause thereof contains explicit provision as to the effect of vacancy, this should also be held to be included under the language of another condition which does not expressly mention it. However that may be, I am of opinion that the fact that no person is actually living in the house may, in combination with other material circumstances, be a factor contributing to make up, in the aggregate, such a changed situation as to be material to the risk which had been undertaken by the insurer. It seems clear that the material change which, in the absence of notice, may avoid the policy, may be external to the building insured: *Reid v. Gore District Mutual Fire Insurance Co.* (1854), 11 U.C.R. 345; *Lomas v. British America Assurance Co.*

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(1863), 22 U.C.R. 310. Provided, of course, that the change is one effected by the insured, or with his consent.

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In the present case, as will appear on perusal of the policy, the insurance was upon all the buildings and for an aggregate sum of \$2,000 on all; the provision by which \$500 was placed upon barn No. 1 being merely the distribution or apportionment made by the policy among the several buildings covered. It was one policy or contract in respect of all. That being clear, it seems to me manifest that any change made by the insured, in regard to any one or more of the buildings covered, whereby the risk is affected in respect of any other of the buildings, must be deemed to be a change material to the risk upon such latter building, within the meaning of the condition of the policy.

"A fact is material where the knowledge or ignorance of it will naturally influence the judgment of the underwriter as to whether he will enter into the contract, or in estimating the degree and character of the risk, or in fixing the rate of premium." Corpus Juris, vol. 32, p. 1271.

Adverting to the circumstances of the present case, it is to be noted that, subsequent to entry by the company into the insurance contract, the plaintiff leased the farm property to a neighbour, who did not, and was not intended to, live upon the premises; the plaintiff and his family left the house upon the premises and moved to and took up residence in another municipality, and no person was actually living (in the ordinary and common acceptance of the word "living") in the house or upon the farm; the dwelling house itself was moved from a position near to the barn which was destroyed to a position half a mile distant, and the barn was left, standing by itself, near a side-road upon which few people were travelling; where, therefore, it would be subject to trespass by tramps with little or no fear, on their part, of their presence being noticed or detected, either by the owner, the lessee, or by the travelling public. Having in mind the probability that the fire which occurred was caused by a tramp or tramps, and therefore, if that be true, resulting from the very danger of which the risk was greatly increased by the changes which were so made by the plaintiff, it appears to me unquestionable that the making of such changes was material to the risk undertaken by the insurance company. Apparently the danger of loss from the very cause from which in all probability this loss took place was materially increased by the changes which were made.

After careful consideration, I have reached the conclusion that the result of the combination of changes made by the plain-

tiff, and which have been stated above, effected a change or alteration material to the risk within the meaning of the condition of the insurance contract, and, no notice of such changes having been given to the insurance company, the contract was thereby voided, and the plaintiff's action must fail.

The contention that because one of the barns, which was located near the main highway, and to the vicinity of which the house was moved, was covered by the policy at the same rate of premium, and that therefore the isolation of barn No. 1 from the house, by the removal of the latter, could not be a change material to the risk, is not a satisfactory replication in the facts of this case. The rate of premium is only one of the factors which go to determine the materiality of the change. In the present case, as already stated, the chief danger of fire, if not indeed the only danger, to which barn No. 1 in its isolated position on the side-road was subjected was from tramps. There was not the same danger of trespass by tramps in the case of the barn which was located near to the main highway, and was therefore in a sense under the eye of the travelling public. The Court has no right to make a contract for the insurance company, or to interpret any contract other than the one which was entered into, and, in my opinion, the insurance company was entitled to be informed of the changes which were made by the plaintiff, and, in the light of the changed circumstances, to determine whether or not it would continue the insurance in force, and at the same or at an increased premium rate.

I am therefore of opinion that the appeal should be allowed and the action dismissed, both with costs.

Appeal allowed.

[RANEY, J.]

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NOV. 13.

GAULEY v. CANADIAN PACIFIC RAILWAY CO.

Negligence—Railway—Motor-vehicle Struck by Train at Level Highway Crossing—Findings of Jury—Contributory Negligence—Apportionment of Fault—Mistake of Jury as to Onus in Respect of Ringing Bell—Verdict—Nullity.

The plaintiff's motor-vehicle crossing the defendants' lines at a level highway crossing was struck by a train of the defendants and destroyed or damaged. At the trial of an action for negligence causing the collision, the jury found negligence of the defendants, consisting in: "Train going more than 10 miles per hour. No definitely conclusive evidence that bell was ringing." The jury

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found also contributory negligence of the plaintiff, viz., "Should not have approached and crossed tracks in high gear," and apportioned the fault between him and the defendants in the ratio of 14 to 86 per cent.:—

Held, that the inference from the finding "No definitely conclusive evidence that bell was ringing" was that the jury were under the impression that the onus of establishing that the bell was ringing was on the defendants, and was not really a finding of negligence against them; and, as the finding may have influenced the jury in their apportionment of fault, the verdict could not stand. The trial Judge treated the verdict as a nullity and ordered the action to be restored to the list for re-trial.
Service v. Sundell, [1929] W.N. 182, 241, followed.

AN action for damages for injury and loss sustained by the plaintiff in a collision at a level crossing between his motor-vehicle and a train of the defendants.

The action was tried before RANEY, J., with a jury, at a Toronto sittings.

T. N. Phelan, K.C., and *William Douglas*, for the plaintiff.

Angus MacMurchy, K.C., and *J. Q. Maunsell*, for the defendants.

November 13. RANEY, J.:—The action is for damages arising out of a crossing collision on the railway company's line between Orillia and Coldwater.

At the trial it was admitted that the case was within the prohibition of clause (c) of sec. 309 of the Railway Act, R.S.C. 1927, ch. 170, and that therefore the railway company was limited at the time of the accident to a speed of 10 miles an hour at the crossing in question.

The jury answered questions submitted as follows:—

"1. Was the collision between the defendants' train and the automobile of the plaintiff, Gauley, caused by the negligence of the defendants or their servants? A. Yes.

"2. If so, in what did such negligence consist? Answer fully. A. Train going more than 10 miles per hour. No definitely conclusive evidence that bell was ringing.

"3. Was there negligence on the part of the plaintiff, Gauley, contributing to the collision? A. Yes.

"4. If so, in what did such negligence consist? Answer fully. A. Should not have approached and crossed tracks in high gear.

"5. At what amount do you assess the damages of the plaintiff, Gauley? A. \$2,261.

"6. If there was negligence on the part of the plaintiff, Gauley, how do you apportion the fault as between him and the railway company? A. 14% Gauley; 86% railway."

The difficulty arises under the answer to the second question, read in conjunction with the apportionment of fault under the answer to the sixth question.

The inference from the second part of the answer to the second question—"No definitely conclusive evidence that bell was ringing"—would be that the jury was under the impression that the onus of establishing that the bell was ringing was on the defendant company, and this part of the answer to the second question is not therefore a finding of negligence against the railway company. But this finding may have influenced the jury in its apportionment of fault between the plaintiff and the defendant company, and therefore the verdict cannot stand: *Reynolds v. Canadian Pacific Railway Co.* (1926), 59 O.L.R. 396, and [1927] S.C.R. 505.

If I were to give judgment for a formal dismissal of the action, the Appellate Division would, I think, promptly set the judgment aside and order a new trial. To avoid that expense and delay, I ought, I think, to treat the verdict as a nullity, and to order the case to be restored to the list for re-trial: *Service v. Sundell*, [1929] W.N. 182, and in appeal [1929] W.N. 241.

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[McEVOY, J.]

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HERCZEG V. BARSEY.

Husband and Wife—Action against both jointly for Slander Uttered by Wife—Married Women's Property Act, sec. 3.

Section 3 of the Married Women's Property Act, R.S.O. 1927, ch. 182, is an enabling provision passed for the benefit of married women, and not for the relief of husbands. It does not take away the right of a person injured to sue jointly a husband and wife for the wife's naked tort committed during coverture.

In an action for a slander uttered by the wife, without the husband's suggestion or approval, judgment was directed to be entered against both jointly for the damages assessed by the jury at the trial, the wife being still alive when judgment was reached.

Edwards v. Porter, [1925] A.C. 1, followed.

ACTION against a married woman and her husband for slander alleged to have been spoken by the married woman of the plaintiff.

The action was tried before McEvoy, J., and a jury at Fort Frances.

A. G. Murray, K.C., for the plaintiff.
C. R. Fitch, for the defendants.

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November 13. McEvoy, J.:—The plaintiff, Lydia Herczeg, by her father as next friend, sues Clara Barsey, a married woman (about 20 years married) and her husband, John Barsey, for slander. The jury found that the defendant the wife uttered the slander, and assessed the damages at \$100. There was no evidence whatever to connect the defendant John Barsey with the slander, either as having suggested it to his wife, or as having in anywise approved of it. His only offence was, and is, his being the husband of the actual slanderer during the coverture and now. The husband and wife are sued jointly, and the plaintiff pleads that Clara Barsey is the wife of John Barsey.

The slander which the jury found to have been uttered was uttered in the year 1929—in March. The Revised Statutes of Ontario of 1927 became operative on the 1st January, 1928. This case therefore falls to be decided, so far as the Married Women's Property Act may concern it, under the Act as it appears in R.S.O. 1927, ch. 182.

It is beyond controversy that at common law a husband not only might, but of necessity, "for conformity," must, if the wife is to be sued at all, be sued jointly with his wife for his wife's torts committed during the coverture, and sued to judgment during the life of the wife. The question whether this was only a matter of procedure, made necessary because a married woman at common law could not sue or be sued alone, for that her legal existence was, by the marriage tie, so amalgamated with and absorbed into the legal existence of her husband as to leave only one legal entity to sue or be sued, or whether it was a matter of substantive right, in that on account of the marriage tie what the wife did the husband did or must answer for, because the two were one, seems now not to be of so great importance in a case which concerns what has been called a "naked tort" of the wife during the coverture.

It seems now to have been finally determined that the Married Women's Property Act, where it says (sec. 3) that "a married woman shall be capable of . . . suing and being sued either in contract or in tort or otherwise, as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant or be made a party to any action or legal proceeding brought by or taken against her" is an enabling Act passed for the benefit of married women, and not an Act passed for the relief of husbands, relieving them from being sued jointly with their wives for the wife's torts during the coverture. It enables a married woman to sue and be sued alone, but it does not take away the right of a third party to sue jointly the husband and

wife for the wife's "naked torts," if that third party sees fit to do so, and to sue him jointly with his wife to judgment, provided the wife is alive until judgment is reached.

The matter has not been without marked differences of judicial opinion, both in this Province and in England, where the Act is substantially the same. The pronouncement of the House of Lords, however, in *Edwards v. Porter*, [1925] A.C. 1, has settled the matter until legislation intervenes further. The subject is most exhaustively dealt with there.

The following Ontario cases may be looked at with advantage: *Amer v. Rogers* (1880), 31 U.C.C.P. 195; *Lee v. Hopkins* (1890), 20 O.R. 666; *Traviss v. Hales* (1903), 6 O.L.R. 574.

There is, too, an illuminating article in the October (1929) number of the Canadian Bar Review, vol. 7, p. 500.

At the hearing of this case I endorsed the record with the verdict of the jury, and counsel were invited after oral arguments to submit written arguments. This they have done.

I propose now to endorse the record so that judgment may be entered against the husband and wife jointly for \$100 and costs on the Supreme Court scale. The slander was a vile one. The plaintiff is poor and has been of necessity greatly injured by the slander.

[IN CHAMBERS.]

REX v. BUHAY.

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Nov. 19.

Criminal Law—Vagrancy—Whether Person Addressing Crowd in City Street a Vagrant—Criminal Code, sec. 238—Impeding or Incommoding Peaceable Passengers—Causing a Disturbance—Absence of Evidence of.

The offence aimed at by sec. 238 of the Criminal Code consists in the accused being a loose, idle or disorderly person or vagrant by reason of the doing of one or more of the various acts mentioned in clauses (a) to (j) of the section, and not the doing of these things or one or more of them alone.

Dictum of Rose, J., in Rex v. Jackson (1917), 40 O.L.R. 173, at p. 191, followed.

A conviction of the defendant by a police magistrate for that she unlawfully caused a disturbance in a city street, by impeding and incommoding peaceable passengers, and thereby was a vagrant, contrary to sec. 238, was quashed on the ground that the evidence did not shew that the defendant, who addressed a crowd in the street, thereby caused passengers to be impeded or incommoded, or, if there was evidence of impeding, that a disturbance was thereby caused.

The mere holding of a meeting in the street does not necessarily imply the impeding or incommoding of passengers, and proof of actual impeding is essential to justify a conviction.

Rex v. Kneeland (1902), 6 Can. Crim. Cas. 81, and *Regina v. Daly* (1888), 12 P.R. 411, followed.

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AN appeal by the defendant, upon a case stated by one of the Police Magistrates for the City of Toronto, from a conviction of the defendant by the magistrate for that she "unlawfully did cause a disturbance in Soho-street, in the said city of Toronto, by impeding and incommoding peaceable passengers, and thereby was a vagrant, contrary to section 238, paragraph (f), of the Criminal Code in such case made and provided."

November 9. The appeal was heard by GARROW, J., in Chambers.

H. J. McDonald, for the defendant.

W. B. Common, for the Crown.

November 19. GARROW, J.:—Section 238 (f) of the Criminal Code provides that "Every one is a loose, idle or disorderly person or vagrant who . . . causes a disturbance in or near any street, road, highway or public place by screaming, swearing or singing or by being drunk or by impeding or incommoding peaceable passengers."

The offence aimed at by the statute, so it has been held, consists in the accused's being a loose, idle or disorderly person or vagrant by reason of the doing of one or more of the various acts mentioned in the clauses (a) to (j) of the section and not the doing of these things or one or more of them alone: *per Rose, J.*, in *Rex v. Jackson* (1917), 40 O.L.R. 173, at p. 191.

The evidence in the present case established that on the evening of the 6th September last, at about 8 o'clock, at a point in Soho-street a few feet north of its junction with Queen-street, the accused came to a standstill and began to speak aloud. Almost at once a crowd of people gathered, some 200 at least. They were apparently already in the vicinity and were anticipating something of the kind of thing that happened. Constable Davey says the crowd entirely obstructed the sidewalk and part of the street. He, Davey, walked up to the accused, said she was obstructing the sidewalk, and ordered her to move on. He repeated this more than once, and she refused. He caught her by the arm, and another officer and he escorted her across the street to the police-wagon, where Davey placed her under arrest. I gather from Davey's evidence that, while there was gathered together a considerable body of people, sufficient to be an obstruction to passengers on the sidewalk had any desired to get by, he did not see any one actually being obstructed. He states, "they were all listening, practically the whole crowd."

Detective Sergeant Mulholland's evidence was in part as follows:—

"Q. What just took place while you were there? A. Well, there was a lot of people on the sidewalk, and all of a sudden this woman started to make a speech about free speech and so forth, about the police commissioners, and on which a crowd gathered in a minute or so. We were expecting a meeting there, and the people were there, just the same as we were. They were there to see what was going to happen, so the crowd gathered, and Davey and P.C. Munro and myself asked this woman to move on and she refused. She kept on talking and haranguing and shouting about free speech, and I guess they asked her a couple of times."

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He, too, is unable to say that he saw any one actually obstructed in an attempt to get by. He says, "You could push your way through the crowd," and adds, "Nearly every one that was there was standing or looking to see what was going on;" and at p. 12: "They" (that is the spectators) "were waiting: there was a report that these people were going to have a meeting there, and there was a lot of people—we watched up and down—and as soon as she started to speak they just closed in like that from all sides."

Two main contentions are made by counsel for the accused, either of which, if established, is sufficient, it is contended, to justify the quashing of the conviction.

First, that there was no evidence whatever that any impeding or incommoding of peaceable passengers took place. I agree with this. The whole affair lasted but a few minutes. The people were there in numbers to see what took place, but there is no evidence to indicate that the accused caused them to gather there. It would be quite as reasonable to say that they were there because the police were there in force. The accused did not herself, according to the evidence, obstruct, impede, or incommod any one, nor did she, so far as I can see, cause any one to be impeded or incommoded, nor was any one, no matter by whom it was caused, actually proved to have been impeded or incommoded. The mere fact of holding a meeting in a street does not necessarily imply the impeding or incommoding of passengers, and proof of actual impeding is essential to justify a conviction: *Rex v. Kneeland* (1902), 6 Can. Crim. Cas. 81.

Second, it is contended that, even assuming that there was proof of impeding peaceable passengers, it is necessary to go further under the section, and establish that the accused did cause a disturbance by so impeding passengers. That this is necessary is, I think, clear from the language of the section as well as from the decided cases.

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In *Regina v. Daly* (1888), 12 P.R. 411, the late Mr. Justice MacMahon held that, while the evidence established that the accused was drunk and was guilty of impeding and incommoding peaceable passengers, it failed to establish that he caused a disturbance by being drunk. In that case the conviction was for that he "unlawfully did cause a disturbance in a public street . . . by being drunk, and then was a vagrant, loose, idle, and disorderly person, within the meaning of the Act respecting vagrants." The conviction was quashed.

Here, even if it can be assumed that passengers were impeded by the accused, there is an entire lack of proof that such impeding caused any disturbance. Within the last day or two in this city there occurred the annual Christmas mile-long parade of a well-known mercantile establishment, an event which is a delight to thousands of children as well as to their parents. Many hundreds of citizens, intent on getting to their places of business, were thereby impeded and incommoded. Could those who take part in such a parade be successfully prosecuted as vagrants, or as loose, idle, or disorderly persons? I very much doubt it. If citizens were incommoded, there was no disturbance in the proper sense by reason of such incommoding. And see the annotation "Religious Gatherings in Streets and Highways," 6 Can. Crim. Cas. 339, referring to *Regina v. Booth et al.* (1890), London Times, July 2, in which case Lord Chief Justice Coleridge told the jury that it was not every trifling or temporary obstruction that would be an offence.

I would hold therefore that, on this ground too, the conviction is bad.

A third point was mentioned, to the effect that the section of the Code in question does not apply to persons of general good character, but is intended to apply to loose, idle, and disorderly persons only, and reliance was placed in support of this upon the *Kneeland* case, already referred to, and upon *Pointon v. Hill* (1884), 12 Q.B.D. 306, and *Regina v. Bassett* (1884), 10 P.R. 386. In the latter case it was held by Osler, J. (as he then was), that before a person can be convicted under the Vagrancy Act he must have acquired in some degree a character which brings him within it. Here there is no evidence of the previous character of the accused, except that she was once seen in Queen's Park. This is scarcely sufficient to constitute her a vagrant, or, if it is, most citizens of Toronto are vagrants. But, in view of the language of the section, that every one who *does* the things mentioned, or some of them, and thereby causes a disturbance, is a loose, idle, or disorderly person or vagrant, I do

not rest my decision upon the ground last mentioned. For my own part I prefer the view taken, upon this point, in the case of *Rex v. Benson* (1928), 50 Can. Crim. Cas. 426.

But, upon the first two grounds discussed, I am of the opinion that the conviction is bad and must be quashed.

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Nov. 20.

Will—Illiterate Testator—Authorised Person Executing (in Scotland) by Signing his own Name—Sufficiency to Pass Lands of Testator in Ontario—Wills Act, sec. 11.

A testamentary document signed in Scotland specifically dealt with real estate in Ontario. The document was executed before C., a notary public, and was signed, in the presence of two witnesses, by C., not by the testator (B.), and not in the name of the testator—C. signing his own name, and the witnesses signing a statement that they had heard authority given to C. and heard the document read over to B., who declared that he could not write:—

Held, upon an application under the Vendors and Purchasers Act, that the validity of the disposition made by the document depended upon its due execution according to the law of Ontario; and the execution sufficiently complied with sec. 11 of the Wills Act, R. S. O. 1927, ch. 49, and conveyed the estate of B. in certain lands which were the subject of a contract of purchase and sale.

In Bonis Clark (1839), 2 Curt. 329, followed.

MOTION by a vendor of land, under the Vendors and Purchasers Act, for an order determining the validity of an objection made by the purchaser to the title.

November 19. The motion was heard by MIDDLETON, J.A., in the Weekly Court, Toronto.

R. L. Kellock, for the vendor.

M. Crabtree, for the purchaser.

November 20. MIDDLETON, J.A.:—On the 9th February, 1901, Robert Brown, then domiciled and resident in Scotland, executed a document, testamentary in its character, before Charles S. Campbell, a notary public. This document was signed by Campbell in his own name; and his signature was attested by two witnesses. To this document there is an attestation clause as follows:—

“By authority of the above named and the designed Robert Brown, who declares that he cannot write, never having been taught, I, Charles Smith Campbell, writer, Glasgow, notary public,

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subscribe these presents for him, he having authorised me for that purpose, and the same having been previously read over to him by me in the presence of the witnesses before named and designed, did subscribe this document in testimony of their having heard authority given to me as aforesaid and heard these presents read over to the said Robert Brown."

This clause is also signed independently by the notary.

The objection taken is, that this document, being regarded as testamentary in its nature, is not adequately executed, in that the name of Robert Brown was not thereunto subscribed.

The document specifically deals with real estate in the Province of Ontario, and therefore the validity of the disposition made depends upon the due execution of the will under the laws of this Province.

The Wills Act, R.S.O. 1927, ch. 149, sec. 11, requires that a will shall be in writing and shall be "signed at the foot or end thereof by the testator or by some other person in his presence and by his direction." The question is, whether this imports the signature in the name of the testator, or whether a signature by the other person who is authorised and directed to sign may be in the name of that person.

The precise question was determined in *In Bonis Clark* (1839), 2 Curt. 329. Clark, the testator, being very ill, requested Mr. Furlong, the Vicar of Warfield, to prepare his will. This was done, and it was then found that Clark was unable to sign his name, and he requested Mr. Furlong to sign the will for him, which he did thus, "Signed on behalf of the testator in his presence and by his directions by me, C.F. Furlong, Vicar of Warfield, Berks." This was witnessed by two others as required by the statute. Sir Herbert Jenner allowed the probate, stating that the signature by the person authorised, required by the statute, may be either in the testator's name or in his own. This decision has stood from that time unchallenged and is referred to as good law in all the leading books upon wills and in the last (16th) edition of Tristram and Coote's Probate Practice, pp. 25 and 497.

The only case in which *In Bonis Clark* has been referred to, so far as I can ascertain, is *In Bonis Marshall* (1866), 13 L.T.R. 643, where it was stated that it had been established by that case, that where a person who was requested by a testator to subscribe his will for him wrote his own name instead of that of the testator such signature was sufficient. In that case there was difficulty in establishing that the testator had requested or directed the signature in the presence of the subscribing witnesses, it being regarded as essential that they should understand from something the

testator said or did that the other party was signing for him.

The only other case worth mentioning is *In Bonis Blair* (1848), 6 N. C. 528, a decision of Sir John Dodson, which perhaps determines very little, but certainly nothing in conflict with what I have indicated.

Under these circumstances, I have no hesitation in declaring that the objection is not well-founded and that the document in question is sufficient to convey the estate of Robert Brown in the lands in question.

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[APPELLATE DIVISION.]

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CITY OF OTTAWA v. OTTAWA ELECTRIC RAILWAY Co.

Nov. 22.

Contract—City Corporation and Street Railway Company—“Transportation System”—Operation of Motor-busses partly within and partly without City-limits—By-law Imposing Fee or Charge—Tax, not Licence-fee—Public Vehicles Act, sec. 4 (18 Geo. V. ch. 43, sec. 2)—Exemption from Taxation—Private Acts relating to Company—British North America Act, sec. 92(2).

In an action to recover from the defendant company certain fees alleged to be payable under a by-law of the plaintiff corporation, passed under the authority of sec. 4 of the Public Vehicles Act, R.S.O. 1927, ch. 252, as enacted by sec. 2 of the Public Vehicles Amendment Act, 1928, 18 Geo. V. ch. 43, it was held, having regard to the provisions of the by-law and of an agreement between the parties of the 24th January, 1924, confirmed by both Dominion and Provincial legislation of the same year, that the fee or charge fixed by the by-law in respect of the passenger motor-busses operated by the defendant company from some point or points within the city over a route which ran through the town of E., which is separated from the city by the R. river, to a road in the county of Carleton, a few hundred yards beyond the easterly limits of E., was not a licence-fee, but a tax; and, as the by-law attempted to tax the defendant company only in respect of the operation of the busses over the city streets, that operation was authorised by the agreement, was part of the defendant company's “transportation system,” as defined by the agreement, and was therefore exempt from taxation by the terms of clause 5 of the agreement.

Review of the various private Acts relating to the defendant company. The legislative power to impose the “fee or charge” rests upon the power to make laws in relation to “direct taxation within the Province” given by para. 2 of sec. 92 of the British North America Act.

AN appeal by the defendant company from the judgment of LOGIE, J., at the trial of the action, awarding the plaintiff corporation \$864.98 and costs of the action, which was brought to recover the amount of certain fees alleged by the plaintiff corporation to be payable by the defendant company under a by-law of

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the corporation passed under the authority of sec. 4 of the Public Vehicles Act, R.S.O. 1927, ch. 252, as enacted by sec. 2 of the Public Vehicles Amendment Act, 1928, 18 Geo. V. ch. 43.

September 24. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

Redmond Quain, for the appellant company. By an Act of the Parliament of Canada, 1894, 57 Vict. ch. 76, sec. 18, the Ottawa Electric Railway Company was exempted from taxation on its works. By clause 5 of an agreement entered into between the Corporation of the City of Ottawa and the railway company in 1924 (see the Ontario Act (1924) 14 Geo. V. ch. 143, and the Dominion Act (1924) 14 & 15 Geo. V. ch. 84), the company got similar exemption on its works, except that in the latter case the works are described as the company's "transportation system." These latter words are interpreted in the agreement (subclause (d) of clause 1 of the 1924 agreement) in such a way as to include motor-vehicles. The company was granted a franchise (clause 8 (a)) to operate a transportation system within the limits of the City of Ottawa. The Legislature could not have possibly made clearer its intention to empower the street-railway company to carry on the business referred to in the agreement, namely, the bus business. So long as the company operates partly or wholly within the city, whether it operates by motor-bus or otherwise, the operation is part of its transportation system within the meaning of the clause, and it is entitled to the exemption. Subclause (g) of clause 8 of the agreement brings the bus business within the franchise granted, as being a thing "usual or necessary" in connection with this company's system. Whatever exemption was had with reference to the street-railway prior to 1924, a corresponding exemption must now be had with reference to the transportation system. Such part of the company's transportation system as is outside the City of Ottawa may be beyond its statutory powers, and the company may require the consent or approval of the Provincial Department of Public Highways to carry on such operations, but that is only so outside the city limits, if it is so at all. It has not been seriously argued that the fee or charge imposed is not the kind of taxation from which we are exempt so far as our operations legitimately carried on under the franchise are concerned. If it is not taxation, then the Province, and consequently the city corporation, has no power to impose it (British North America Act, sec. 92). The fact that city fares were charged within the city, and the fares fixed by the Department of Public Highways

outside the city, is the best evidence of the distinction between the two. When a general Act is passed which conflicts with a previous special or private Act, the general Act is presumed to have general cases in view and not particular cases which have been provided for already by the special Act: *Seward v. Owner of the "Vera Cruz"* (1884), 10 App. Cas. 59, at p. 68; *Hawkins v. Gathercole* (1855), 6 DeG. M. & G. 1, at p. 31; *Conservators of the River Thames v. Hall* (1868), L.R. 3 C.P. 415.

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F. B. Proctor, K.C., for the plaintiff corporation, respondent. The by-law imposing a charge on inter-urban motor-bus lines was passed under the authority of sec. 4 of the Public Vehicles Act, as enacted by 18 Geo. V. ch. 43, sec. 2, with the approval of the Department of Highways. The tax exemption clause in the agreement of the 25th January, 1924, between the city corporation and the defendant company, did not exempt it from the payment of this charge. The words "transportation system" in the agreement apply only to such operations of the company as are carried on under the terms of the agreement and within the fixed fare area. The company carries on other operations outside the terms of the agreement. See *Ottawa Electric Railway Co. v. Township of Nepean* (1920), 60 Can S.C.R. 216. The motor-busses in respect of the operations of which the charge was imposed were not operated under the agreement, and the tax exemption conferred by sec. 5 does not apply. The company had no statutory authority to operate motor-busses except such as was conferred by the Acts validating the agreement (14 Geo. V. ch. 143 (Ont.) and 14 & 15 Geo. V. ch. 84 (Dom.)), and this was limited to operations wholly within the City of Ottawa; and under the terms of the agreement the company obtained such authority as it had to operate its Eastview motor-bus service from the Provincial Highways Department, and the routes, rates of fare, and schedules of operation were all authorised by the Department; without such authority it could not have operated over this route. The answer to the argument that the company was franchised by the agreement to operate such busses over the part of the route which is within the City of Ottawa, is that the agreement provided for service to and from Eastview by street-cars running on tracks, and that the company never carried out its obligation in this respect. The city corporation never authorised the operation of the bus service, which is subject to the charge imposed by the by-law. As to the narrow construction that should be given a tax exemption provision, see *Canadian Northern Railway Co. v. City of Winnipeg* (1917), 54 Can. S.C.R. 589; *Ontario Power Co. of Niagara Falls v. Stamford Corporation*, [1917] 1 A.C. 529. The wording of the

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agreement is admittedly the wording of the defendant company, and should be construed strongly against it.

November 22. ORDE, J.A.:—The action is brought to recover from the defendant company certain sums alleged to be payable under by-law No. 6518 of the City of Ottawa, passed under the authority of sec. 4 of the Public Vehicles Act, R.S.O. 1927, ch. 252, as enacted by sec. 2 of the Public Vehicles Amendment Act, 1928, 18 Geo. V. ch. 43. At the conclusion of the trial, judgment was given for the plaintiff, and from that judgment the defendant now appeals.

For a proper understanding of the points involved, some knowledge of the legislation governing the defendant's corporate powers and franchises is necessary, and it may be convenient at the outset to note the various private Acts relating to the defendant. They are:—

1866, Province of Canada, 29 & 30 Vict. ch. 106, incorporating the Ottawa City Passenger Railway Company.

1868, Ontario, 31 Vict. ch. 45, amending the earlier Act.

1892, Dominion, 55 & 56 Vict. ch. 53, authorising the company to extend its railway line over the Union Bridge into the City of Hull, Quebec, and to operate its railway by other means than horses, except steam.

1894, Ontario, 57 Vict. ch. 76, confirming an agreement of the 28th June, 1893, between the City of Ottawa, the Ottawa City Passenger Railway Company, and the Ottawa Electric Street Railway Company. The last named company had been incorporated by letters patent of Ontario and was then operating an electric railway line on certain streets in Ottawa under an agreement with the city corporation. The agreement so confirmed by the Act contemplated the amalgamation of the two companies.

1894, Dominion, 57 & 58 Vict. ch. 86, confirming the above mentioned tripartite agreement of the 28th June, 1893, and also an agreement of the 26th March, 1894, between the two railway companies, which provided, among other things, for the purchase by the Passenger Company of the Electric Company's undertaking, franchises, powers, and other assets. This Act declared the street-railway lines constructed by the two companies "to be works for the general advantage of Canada," and that the company, whose name was changed from "The Ottawa City Passenger Railway Company" to "The Ottawa Electric Railway Company," be a body corporate subject to the legislative authority of the Parliament of Canada.

1899, Dominion, 62 & 63 Vict. ch. 82, authorising the company to extend the railway to some point at or near Bell's Corners, in the township of Nepean.

1924, Ontario, 14 Geo. V. ch. 143, confirming an agreement between the Corporation of Ottawa and the company, dated the 25th January, 1924, and the by-law authorising the same.

1924, Dominion, 14 & 15 Geo. V. ch. 84, confirming the same agreement.

(I have not included in the foregoing list Acts which deal merely with the company's borrowing powers and the like).

During the period in question in this action the company operated a line of passenger motor-busses from some point or points within the City of Ottawa over a route which ran through the Town of Eastview, which is separated from the City of Ottawa by the Rideau river, to a road called the Baseline-road, in the county of Carleton, a few hundred yards beyond the easterly limits of Eastview.

Section 4 of the Public Vehicles Act, above mentioned, is as follows:—

“A by-law may be passed by the council of any city requiring a person holding a licence or permit under the provisions of this Act, and who operates a public vehicle over a route partly within and partly without the limits of such city to pay to the corporation of such city a fee or charge not being in the nature of a license-fee. Such by-law shall not come into effect unless and until approved by the Department and the Department shall fix the fee to be charged.”

By-law No. 6518 was passed by the council, pursuant to the power given by this section, on the 1st October, 1928, and was approved a few days later by the Department. This action is brought to recover the fee or charge fixed by the by-law in respect of the passenger motor-busses operated by the company over the route above mentioned for the period of six months, commencing on the 1st October, 1928, and ending on the 31st March, 1929, in all \$864.98.

The agreement of the 24th January, 1924, which was confirmed by both Dominion and Provincial legislation of the same year, as above mentioned, supplemented and extended the terms of the old agreement of the 28th June, 1893, and provided for many things, such as track extensions, fares, etc. And it also provided, for the first time, for the operation by the company of motor-busses over the city's streets as part of the company's business. These provisions appear in the following clauses of the agreement. The phrase “ transportation system,” as applic-

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able to the operations of the company, is defined by para (d) of clause 1 thus: " 'Transportation system' shall mean any system for the operation of electric cars, either on metal tracks or without tracks, or for the operation of motor-'busses by gasoline, electricity or other power, except the force of animals, and any system for the operation of vehicles for the carriage of passengers, but shall not include vehicles chartered for special trips, such as cabs and taxi-cabs."

Clause 8 provides:—

"(a) The company shall have and may exercise, during the term of this agreement, and of the said agreement of June 28th, 1893, and of any extension or renewal thereof, an exclusive franchise to construct, complete, maintain and operate within the limits of the city, as such limits may be from time to time, a transportation system, on the company's present lines and any extensions or additions thereto, it being the intention of the parties hereto that the company shall not be subject to competition in its business of transporting passengers whether such competition be in the nature of motor-'busses or otherwise."

"(c) The company will not object to the operation, within the limits of the city, as such limits may be from time to time, of motor-'busses running between any point within one-quarter mile of the city-hall and towns and villages, whether incorporated or unincorporated, outside the said limits, but no such motor-'bus shall convey passengers from one point within the said city-limits to another point therein."

Then there is clause 5, under which the defendant company claims to be exempt from the imposition of the fee or charge imposed by by-law 6518:—

"5. During the term of this agreement and of the said agreement of June 28th, 1893, and of any extensions or renewals thereof, the city shall grant the company exemption from taxation and all other municipal rates on its franchises, tracks, rolling stock and other personal property used in and about the working of the transportation system, also on the income of the company from the working of the said transportation system. But this shall not apply to the real estate of the company. This exemption shall apply to the tax known as business tax, it being the intention of the parties hereto that the company shall, under this supplementary agreement, have the same exemption from taxation as it had during the first thirty years of the agreement of June 28th, 1893."

The learned trial Judge says: "In my opinion, interurban service by a 'bus line is not covered by either of the agreements, and, if such a service is operated, it is entirely without the

ambit of the franchise, or the exemption granted by those two agreements and confirmed by statute."

The earlier agreement contained a clause in substantially the same terms as clause 5 of the agreement of the 25th January, 1924, above quoted, except that the word "railway" was used in the earlier agreement where the words "transportation system" appear in clause 5.

That the fee or charge imposed by the by-law is a tax is, I think, quite clear. It is fixed at "one-tenth of a cent per scheduled passenger mile of travel over or along all streets traversed by such service within and under the jurisdiction of the City of Ottawa." It is not a licence-fee, and the legislative power to impose the "fee or charge" must rest upon the power to make laws in relation to "direct taxation within the Province" given by para. 2 of sec. 92 of the British North America Act. So that, unless the operation of the 'busses in question falls outside the range of clause 5 of the agreement, the defendant is entitled to the benefit of the exemption thereby accorded it by the city corporation.

The city contends that the words "transportation system" in the agreement mean and include only such part of the operations of the company as was authorised by the city corporation, and that the 'bus service in question, being interurban, forms no part of the system, as so authorised, or, as put by the learned trial Judge, is "without the ambit of the franchise." And it is argued that the company did not acquire by the agreement or by the Acts ratifying it any power to operate 'busses except within the limits of the city.

I do not find in any of the legislation prior to 1924 any power, either express or implied, given to the company to operate passenger motor-'busses, and I am therefore assuming that the corporate power to do this was first given by the Dominion Act of 1924. The Act itself does not give any such power by any express language, but the power necessarily flows from the confirmation of the agreement and the provision in sec. 1 that "the parties thereto are hereby empowered and authorised to carry out their respective obligations and to exercise their respective privileges thereunder."

What were the privileges conferred upon the company by the agreement, so far as the use of 'busses is concerned? It is of course quite clear and is admitted that, if the use of 'busses was not permitted before, it was thereafter to be permitted as part of the company's transportation system, limited however to the purpose of carrying passengers and not to include specially chartered vehicles such as cabs or taxi-cabs.

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While it is quite true that the city could not restrict or impose obligations upon the company with respect to its operations beyond the city-limits (except perhaps contractually as a term of some agreement), and that therefore the agreement in question had to do with the company's franchise or rights over the city streets, I am unable to see how this fact necessarily restricts the meaning of the words "transportation system" as defined and used throughout the agreement. At the time of the agreement the company was in fact operating a street-railway system which extended beyond the city-limits, to Rockcliffe on the east, into the Township of Nepean on the west, and across the Ottawa river into the Province of Quebec on the north. The words "transportation system" are declared to mean "any system for the operation of electric cars or for the operation of motor-'busses," and are, I think, referable as a definition to the whole of the company's corporate operations, just as would the word "railway" had it been used with reference to the company's then existing system.

If 'busses travelling beyond the city-limits are not within the definition, what meaning is to be attached to the stipulation in clause 8 (a) that the company is not to be subject to competition in its business of transporting passengers even by motor-'busses, followed by what is really an exception from that stipulation, namely the provision in para. (c) of that clause that the company will not object to the operation of motor-'busses from any point within a quarter of a mile from the city-hall to points outside the city? If the agreement has no application whatever to interurban 'busses to be operated by the company, the provision in para. (c) of clause 8 is wholly unnecessary. No other inference can be drawn from para. (c) than that any other interurban passenger 'bus service running from some point farther than one quarter of a mile from the city-hall might come into competition with the company.

Whether or not, in a contest between one of its shareholders and the company, or between the Attorney-General and the company, the company would be held to have corporate power to carry on a passenger 'bus service beyond the limits of the City of Ottawa, might perhaps be a nice question which we are not called upon to decide here. But, so far as the agreement of 1924 is concerned, while the restrictions imposed and the benefits conferred upon the company are necessarily confined to the territorial limits of the City of Ottawa, the agreement cannot, in my judgment, be interpreted as excluding either from the restrictions or from the benefit of its provisions the operation of passenger motor-'busses within the city, merely because they continue on their journey to points

beyond the city-limits. If interurban 'busses do not come within the terms of the agreement, upon what principle are those street-cars which, starting within the city, continue their trips to points outside the city, included? I do not know that the fact is really material, but the evidence of Mr. Burpee made it plain that in operating the 'busses to points beyond the city-limits two fares were charged, one the same as that charged upon the electric cars for that part of the journey within the city and a further fare for that part outside the city.

The by-law, of course, only attempts to tax the company in respect of the operation of the 'bus service over the city's streets. That operation, in my judgment, was authorised by the agreement, was part of the company's "transportation system," as defined by the agreement, and is therefore exempt from taxation by the terms of clause 5 thereof.

I think the appeal should be allowed and the action dismissed with costs here and below.

LATCHFORD, C. J., and MASTEN and FISHER, JJ.A., agreed with ORDE, J.A.

RIDDELL, J.A.:—I had drafted a judgment in this case; but the judgment of my brother Orde expresses so accurately my reasons and conclusions that I do not think it necessary to deliver a separate judgment or to do more than say that I concur in his reasons and conclusions.

Appeal allowed.

[APPELLATE DIVISION.]

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STEINBERG v. COHEN.

Nov. 22.

Contract—Illegality—Stifling Prosecution for Public Offence—Consideration—Chattel Mortgage—Enforcement of Security—Parties not in Pari Delicto—Money Payment—Completed Illegal Transaction.

The plaintiff paid the defendant \$100 and made in the defendant's favour a chattel mortgage for \$400 in order to stifle a prosecution for a public offence:—

Held, that the plaintiff was entitled to a judgment setting aside the chattel mortgage; for the plaintiff, upon the evidence, though *in delicto*, was not *in pari delicto* with the defendant.

As to the \$100, the illegal transaction was complete, and the Court refused to assist the guilty plaintiff.

There was no real inconsistency, for the chattel mortgage was at most a security whereby the plaintiff's property was charged with

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payment of money; as such it required enforcement, and because of the illegality the defendant could never enforce it.
Review of the authorities. *Collins v. Blantern* (1767), 2 Wils. 341, 1 Sm. L.C., 13th ed., 406, at p. 442, and *Erwin v. Snelgrove* (1927), 61 O.L.R. 341, specially referred to.

AN appeal by the defendant from the judgment of the County Court of the County of Essex declaring that a chattel mortgage made by the plaintiff to the defendant was null and void, having been given, as found by the County Court Judge, under threats of prosecution for the offence of receiving stolen goods, and directing repayment by the defendant of \$100 which had been paid by the plaintiff to the defendant.

November 5. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

Gordon Sharer, K.C., for the appellant, argued that where two parties enter into an illegal contract, this contract cannot be set aside in an action brought by either party unless it be shewn that the plaintiff was forced by duress or pressure to enter into the contract. The plaintiff having, through one Gitlin, influenced the appellant to enter into a contract not to prosecute Herman, it was not open to the plaintiff to say that he was induced to enter into the contract by pressure or duress. On the evidence it was clear that the parties were *in pari delicto*, and therefore, as the consideration was illegal, a court of equity would not interfere, and so the learned trial Judge was wrong. Reference to *Fairweather v. McCullough* (1918), 43 O.L.R. 299; *Rourke v. Mealy* (1879), 4 L.R. Ir. 166; *Talbot v. Von Boris*, [1911] 1 K.B. 854; *Wood v. Adams* (1905), 10 O.L.R. 631; *Erwin v. Snelgrove* (1927), 61 O.L.R. 341; *Keir v. Leeman* (1844), 6 Q.B. 308.

L. R. Cumming, for the plaintiff, respondent, contended that he was entitled to succeed, because, though the mortgage was given and the money paid upon an illegal consideration, yet the parties were not *in pari delicto*, as the respondent acted under pressure on the part of the appellant, indirect pressure perhaps, but none the less pressure. Reference to *Jones v. Merionethshire Permanent Benefit Building Society*, [1891] 2 Ch. 587.

November 22. LATCHFORD, C.J.:—The decision of this Court, slightly differently constituted, in *Erwin v. Snelgrove*, 61 O.L.R. 341, reviews the more important cases which state the law applicable where, as here, a prosecution has been stifled for a consideration. It is therefore unnecessary to cite cases establishing the principle that where the parties, though *in delicto*, are not *in pari*

delicto, relief may be accorded to the one less guilty. Upon the evidence, Steinberg, apart from the pressure to which he was subjected, was not *in pari delicto* with Cohen.

The appeal should be dismissed with costs, except as to the \$100 paid to Cohen.

RIDDELL, J. A.:—This is an appeal from the judgment, in favour of the plaintiff, of the County Court of the County of Essex—the evidence discloses as unsavoury and discreditable a story as (I hope) has ever been told in a court of justice.

The defendant is or was a tailor in Windsor who had an employee named Herman who had a key to the premises; one day in September, 1928, he saw Herman and the plaintiff, Steinberg, walking together and observed the brown suit the latter was wearing. He asked to examine this suit and found the lining was of a particular kind kept in Windsor only by himself; the suit had not been ordered from him, and, on being told that it had been obtained from Herman, he became suspicious of him, took away the key from him, and a few days afterwards discharged him. Then Steinberg came to him and said that, if he would take Herman back, he (Herman) "would do the right thing now;" thereupon he re-engaged Herman and "watched him like a 'cop' all day," being suspicious of him stealing from the shop. This went on till May of the present year, when he found lining disappearing, and then he discharged the whole staff, six or seven, and Herman among them.

Cohen, after the discharge of his men, received certain information which caused him to suspect Steinberg, and he went to the police and with a detective went to Steinberg's to search; there he got the brown suit that Steinberg had been wearing the previous September and also a blue suit of Steinberg's boy's; turning over the inside, he discovered that the linings were his material, and made no further search; he took these to the police-station, and had Herman arrested the same day, but not Steinberg. Cohen was told to come back on Monday to lay an information (the Crown Attorney not being on hand—why an information could not be laid without the Crown Attorney does not appear; and the way in which this case was managed by the police well merits inquiry).

The next scene was the police coming to Steinberg's to take him to the station to make a statement concerning the suits, where he got them, etc. He there saw Cohen but had no conversation with him. When he got back home, the wife of Herman came to his house and begged him to go bail for her husband. He did not do so, but went off to Leamington, returning the same evening,

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when the wife came to him again, and told him that Alderman Gitlin could do something for her husband; he went up to the alderman's place about eleven o'clock at night to have the alderman get Herman out of gaol—he says, "I did not have any property, I could not bail him." Gitlin took the matter in hand, but did not do anything so usual as to bail out the supposed thief; he went to Steinberg's on Monday morning with a friend, one Bob Cohen, and the three went to Brooks's place. The alderman said: "Jacob Cohen is going to take a charge against you and arrest you; you had better settle it—give him some money . . . a claim that Herman stole some stuff and you in it . . . give him some money and settle it up and there should be no trial and you should not be arrested . . . if you do not settle you will be arrested, spoil your home, spoil your credit, and your wife and children are going to suffer, and the best way to settle it with him—give him some money." Steinberg protested that he had no money, but at length admitted that he had \$100 in the bank—then Gitlin said, "Take out \$100 . . . and we will go out to Jacob Cohen (the defendant) and settle with him with the \$100." He took out the money and gave it to Bob Cohen, and the two intermediaries went away; in a short time, Gitlin came back with the \$100, said that Cohen would not take \$100—"You will give him \$500." The plaintiff protesting that he did not have the money, Gitlin said, "Jacob Cohen went to the police station to take a warrant to arrest you and if you are arrested you are to suffer and your wife is going to suffer." The plaintiff heard the alderman telephoning the police-station for Cohen not to take out a warrant for him, protested again that he had no money, and Gitlin said, "Make a chattel mortgage." Cohen, telephoned for, came to Gitlin's place, where the plaintiff and Gitlin were waiting for him, and all three went to the office of Mr. C., Cohen's solicitor, where Gitlin told C. to make out a chattel mortgage from Steinberg to Cohen. C. gave instructions to a clerk to make the mortgage as instructed, and himself telephoned the police-station to hold Herman for a few minutes till they got through; then Steinberg gave the \$100 to C., and C. gave it to Cohen. Steinberg signed the chattel mortgage for \$400, so that, as he says "I should not be arrested and spoil my business." While Cohen made the affidavit of *bona fides*, swearing that "the sale . . . is in good faith and for good consideration . . . namely \$400 . . .," there is no pretence that the sum so stated has any relation to the value of the goods Steinberg is supposed to have which were stolen from Cohen—or that the transaction is anything else but a sheer piece of blackmail.

Then Cohen and his victim went to the police-station, Cohen gave instructions that the two suits were to be given up to Steinberg, but this was not at once done—Cohen's boy brought them to Steinberg a little later.

I am leaving out what refers to Herman, as in my view this is quite irrelevant to the present issue—certainly, it does not help the Riddell, J.A. defendant.

The defendant tells us that Bob Cohen and Gitlin offered him \$100 to settle this case when he was at the police-station to lay an information against Herman, that he refused it, that, after a conversation with Gitlin, he went to Gitlin's store and there \$500 was offered him and he accepted it, that Gitlin told him that Steinberg could raise \$500, and he agreed to take \$100 in cash from Steinberg and the chattel mortgage; it is idle to suppose that he did not know that Steinberg was paying the money and giving the mortgage to prevent Cohen prosecuting him. He also says that, after Steinberg paid the \$100 and signed the mortgage, C. telephoned the police-station to let Herman go, which was done.

This precious transaction being on Monday, Cohen on the following Wednesday received a telephone message from Steinberg's solicitor to hand back the money and mortgage which he had obtained from Steinberg—he refused, and was soon threatened with arrest, whereupon he saw his solicitor, Mr. C., who advised him to see the Crown Attorney; he did so, and that officer advised to "have them all arrested." Herman had been released and had "jumped the country." Cohen laid an information against Steinberg for unlawful receiving of stolen goods; and, as we were informed by counsel, Steinberg appeared for trial and was discharged, the charge being withdrawn.

The plaintiff, on the 4th June, 1929, issued a writ claiming a declaration of the nullity of the chattel mortgage and return of the \$100, and the above delectable story was told in court, whereupon the learned County Court Judge gave judgment for the plaintiff as asked with costs; the defendant now appeals.

It is perfectly clear that the money and mortgage were exacted from the plaintiff as consideration for the defendant refraining from prosecuting him for a crime; and that not a crime (if there are such) with which the parties alone were interested, but a public offence, until recently called a felony, being made such as early as the 17th century. To suggest that such a transaction should stand is to insult common sense.

The person whose prosecution and imprisonment were threatened being the plaintiff himself, we need not consider whether what is stated in Anson on Contracts, 17th ed., p. 211, opposed as it is in

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my opinion to public policy and common sense, is really law; I mean the statement that to constitute duress "the subject of it must be the contracting party himself, or his wife, parent or child

. . . . a contract entered into in order to relieve a third person from duress (which is defined as consisting 'in actual or threatened violence or imprisonment') is not voidable on that ground."

When the question falls to be answered, 1 Rolle Abr. 688, *Huscombe v. Standing* (1608), Cro. Jac. 187, *Rourke v. Mealy*, 4 L.R. Ir. 155, will need to be considered, as well as our own case of *Erwin v. Snelgrove*, 61 O.L.R. 341, in which it was the brother of the plaintiff who was to be imprisoned unless redeemed by the plaintiff.

It is unnecessary to cite the numerous cases on the subject, this Court having, in the last named case, laid down the law on the matter. The contract cannot stand, as the parties were not, according to the authorities, *in pari delicto*—and, beyond question, the chattel mortgage is null and must be delivered up to be cancelled. The only doubt entertained on the hearing was whether the money paid can be ordered to be repaid. During the argument I expressed the opinion that this sum could not be recovered back; it having been paid by a person, a party to the delict, the conspiracy. Subsequent consideration led me to doubt the correctness of this view; but, after considering the cases and the principles involved, I am now firmly of the opinion then expressed. My brother Masten has collected the principal cases and I do not repeat them.

I would dismiss the appeal except as to the \$100, but with no costs of action or appeal.

We should not, I think, part with the action by simply declaring the rights of the parties to the action in respect to the money and the mortgage. There was a glaring conspiracy to defeat the ends of justice, participated in by the plaintiff, the defendant, Alderman Gitlin, Bob Cohen, and perhaps the solicitor, whose full name I do not give here, lest injustice may have been done him. A copy of the proceedings should be furnished the County Crown Attorney and the Law Society for such action as they may think proper.

MASTEN, J.A.:—Appeal from the judgment of the County Court of Essex, dated the 8th April, 1929, declaring that a chattel mortgage for \$400 made by the plaintiff to the defendant is null and void, and directing repayment by the appellant to the respondent of the sum of \$100 heretofore paid by the respondent to the appellant.

The action is based on the ground that, though the mortgage was given and the money paid in pursuance of an illegal agreement to stifle a prosecution of one Herman for theft, yet the parties are not *in pari delicto* because the respondent acted under oppression and under pressure emanating from the defendant. At the time of the agreement, Herman was in custody awaiting trial. The prosecution was effectively stifled; Herman was released without trial and fled the country. The respondent was not indebted to the appellant nor was he under accusation by the police authority, but I think it appears from the uncontradicted evidence that he was oppressed by the fear that the prosecution of Herman for theft might lead to a prosecution of himself for receiving the property alleged to be stolen. Further, that, though the plaintiff voluntarily made the first approach to the defendant regarding the stifling of the prosecution against Herman, and though the defendant did not personally or directly threaten the respondent, yet, before the chattel mortgage was given or the money paid, I think that pressure affecting the will of the respondent did indirectly emanate from the appellant.

With regard to the fact of pressure I agree with my brother Riddell. That the purpose of the agreement was to stifle the prosecution of Herman is not in dispute. Neither is it in question that the agreement was completely carried out by the payment of \$100, the giving of the chattel mortgage, and the release of Herman. These being the essential facts, the remaining question is one of law as to the right of the plaintiff to the relief sought by him.

It seems to me to be necessary to distinguish the branch of the action which seeks to set aside the chattel mortgage from the branch which seeks repayment of the \$100 cash paid.

Any action which has arisen out of an illegal agreement has usually ranged itself under one of the three following categories:—

First, an action by the holder of an agreement or security given in pursuance of an illegal agreement to enforce that agreement or security.

Second, an action in equity by the giver of such a security to have it set aside or given up.

Third, an action at common law by one who has paid money under an illegal agreement to get it back.

In the present action, that branch by which it is sought to set aside the chattel mortgage belongs to the second category, the claim to recover back the \$100 paid belongs to the third category, and the first category has no application to the present action.

I have felt little difficulty in regard to the claim to set aside the chattel mortgage, but the claim to recover back the \$100 cash

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paid, notwithstanding the fact that it was paid to stifle a prosecution for an offence of a public nature (viz., stealing), has given me concern, particularly as I have found no reported case either in England or in Ontario where restitution of money, paid under the circumstances here shewn, has been adjudged. I have therefore been at some pains to examine the cases bearing on these questions.

In the case of *Smith v. Bromley* (1760), 2 Doug. 696, note, 99 E.R. 441, Lord Mansfield said:—

"If the act is in itself immoral, or a violation of the general laws of public policy, there, the party paying shall not have his action; for where both parties are equally criminal against such general laws, the rule is *potior est conditio defendantis*. But there are other laws, which are calculated for the protection of the subject against oppression, extortion, deceit, etc. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover, and it is astonishing that the reports do not distinguish between the violation of the one sort and the other."

The observations of Heath, J., in *Tappenden v. Randall* (1801), 2 Bos. & P. 467, 126 E.R. 1388, suggest that the attitude of the Court may vary according to the circumstances. In that case the plaintiff sued successfully for the return of premiums paid for a policy of insurance which turned out to be illegal because the plaintiff had no insurable interest. An appeal was heard before the full Court of Common Pleas, and again the plaintiff succeeded. But in the course of his judgment Heath, J., observes:—

"Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the Court to enter into any discussion of it; as where one man has paid money by way of hire to another to murder a third person."

To the like effect is the statement of Lord Denman in the case of *Keir v. Leeman*, 6 Q.B. 308, 321, where he says:—

"We shall probably be safe in laying it down that the law will permit a compromise of all offences, though made the subject of a criminal prosecution, for which offences the injured party might sue and recover damages in an action. It is often the only manner in which he can obtain redress. *But, if the offence is a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it.*"

The decision of Denman, C.J., was appealed to the Court of Exchequer Chamber (9 Q.B. 371), where the judgment of the Court was delivered by Tindal, C.J., who affirmed the judgment below. In the course of his reasons he says (p. 395):—

"Indeed it is very remarkable what very little authority there is to be found, rather consisting of dicta than decisions, for the principle, that any compromise of a misdemeanour, or indeed of any public offence, can be otherwise than illegal, and any promise founded on such a consideration otherwise than void. If the matter were *res integra*, we should have no doubt on this point. We have no doubt that, in all offences which involve damages to an injured party for which he may maintain an action, it is competent for him, notwithstanding they are also of a public nature, to compromise or settle his private damage in any way he may think fit. It is said, indeed, that in case of an assault he may also undertake not to prosecute on behalf of the public. It may be so: but we are not disposed to extend this any further."

"In the case before us, the offence is an assault coupled with *riot* and the obstruction of a public officer. No case has said that it is lawful to compromise such an offence."

The distinction between cases where the Court will, and where it will not, direct the repayment of money is touched upon by Baron Parke in the case of *Higgins v. Pitt* (1849), 4 Ex. 312, 154 E.R. 1236, where he says (4 Ex. at p. 324) :—

"There are cases where a *particeps criminis* has been allowed to recover back money paid as the consideration for an illegal act, where, though guilty, he is not *in pari delicto*; as a bankrupt who has paid money to obtain his certificate, or a borrower, the premium of usury . . . or the lender, a composition for a *qui tam* information for that offence. . . . In such cases, the law considers that he is oppressed, and advantage taken of his situation, and that he is entitled to be restored to the benefit he has lost by the oppressive act of his creditor. Whether a debtor paying money down, as the price of procuring a fraud on his other creditors, before the creditors enter into the composition, is in this condition, notwithstanding the dictum of Lord Ellenborough and Bayley, J., in *Smith v. Cuff*, may be doubted."

The case of *Herman v. Jeuchner* (1885), 15 Q.B.D. 561, shews that the Court will not readily accede to the plaintiff's claim to recover back money. In that case the plaintiff had been convicted of a crime and ordered to find two sureties in £50 each for his good behaviour for two years. Being unable to find more than one surety, the plaintiff was imprisoned in default. While in prison he desired the defendant to become surety for him, but the defendant refused unless the amount for which he was to become surety should be deposited with him for the space of two years. The plaintiff accordingly deposited the sum of £49 with the defendant, who thereupon became surety for the plaintiff, and he

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App. Div. was released. The plaintiff, before the expiration of the two years, brought this action to recover the £49 deposited with the defendant, but the action was dismissed by the Court of Appeal.
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COHEN. In that case the plaintiff was under pressure, but it is to be observed that there was no pressure exerted upon him by the Masten, J.A. defendant.

In *Windhill Local Board of Health v. Vint* (1890), 45 Ch. D. 351, an indictment had been brought against the defendants for interfering with and obstructing a public road. At the trial of the indictment an agreement for compromise was made by which the defendants agreed to restore the road, whereupon the plaintiffs were to consent to a verdict of "not guilty" on the indictment. The defendants failed to restore the road, and the plaintiffs then brought an action on their covenant claiming specific performance and damages:—"Held (affirming the judgment of Stirling, J.), that as the indictment was for a public injury, the agreement to consent to a verdict of not 'not guilty' was against public policy and illegal, and the plaintiffs could not maintain an action on the defendants' covenant. The action was therefore dismissed." *Keir v. Leeman* was quoted at length and was confirmed and followed.

The case of *Jones v. Merionethshire Permanent Benefit Building Society*, [1892] 1 Ch. 174, illustrates the difference in treatment accorded by the Court to claims to set aside agreements on the one hand and on the other hand to claims to recover back money. In that case the secretary of a building society, who had made default in accounting for money paid to him and was threatened by the society with a prosecution for embezzlement, applied for assistance to the plaintiffs, who were his relatives, and they gave a written undertaking to the society to make good the greater part of the debt due from the secretary, the expressed consideration being the forbearance of the society to sue the secretary for the amount for which the plaintiffs made themselves responsible, and in pursuance of that undertaking they gave two promissory notes and some title deeds as collateral security to the society. The plaintiffs in giving the undertaking were actuated by the desire to prevent the prosecution, and that was known to the directors of the society; but no promise was made that there should be no prosecution. The society brought an action on the promissory notes in the Queen's Bench Division, and the plaintiffs brought an action in the Chancery Division to set aside the promissory note and the collateral securities on the ground that they were made for an illegal consideration. The Queen's Bench action was transferred to the Chancery Division and the two actions tried together:—

Held (affirming the decision of Vaughan Williams, J.), that it was an implied term of the agreement that there should be no prosecution; that the agreement was therefore founded on an illegal consideration, and void; and that the society could not recover on the promissory notes or enforce the securities; and, the society not opposing, they were ordered to be delivered up to Masten, J.A. the plaintiffs.

The action, as dealt with, falls under the first category which I have mentioned, as a refusal to enforce payment of the two promissory notes on which the society had brought action.

Lindley, L.J., and Fry, L.J., found that pressure had not been proved, but the notes and securities were ordered to be given up because the society had so agreed.

The judgment of Bowen, L.J., is highly important. In the beginning of his judgment he says:—

“The cases may be ranged under two heads: first of all, the cases where there is the suggestion of an agreement to stifle, as it is called, a prosecution; and secondly, the cases where there has been that which amounts to pressure or undue influence within the meaning attached to these terms by a Court of Equity.”

He then proceeds to discuss the law relating to an agreement to stifle; and, after finding that there was such an agreement, he concludes his judgment as follows:—

“Then there is another head under which this class of case might be suggested to fall, and that is pressure or undue influence. I am not myself satisfied that if the learned Judge was right, as we must take him to be in his view, that there was an agreement not to prosecute, that it would not properly follow as an inference of fact that there was undue influence and pressure, and undue influence and pressure exercised by the directors upon the delinquent and upon his friends, who were the defendants in the common law action. It is not necessary for me to express an opinion, because the case is covered by the decision upon the first point. I abstain from expressing a final opinion upon that; but it must not be taken that I myself am convinced that there was an absence of pressure (assuming the learned Judge’s view of the facts to be the correct one), and pressure, as is obvious, which in Equity would entitle the person aggrieved to relief.”

It would seem to follow that, in his view at least, the fact that there was an agreement to stifle a prosecution was decisive to defeat a claim on the notes even if there was pressure.

I note also that in that case the defendants had received from the plaintiffs, in addition to the two promissory notes in question, £176 2s. in cash, but no claim was made by the plaintiff Jones to

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App. Div. recover back that sum from the defendants. And at p. 185 Bowen,
1929. L.J., observes:—

STEINBERG v. COHEN. "The consideration of the notes was the corrupt bargain to stifle the prosecution. I use the term corrupt in the sense that it is a bargain which public policy forbids the Court to give effect to.
Masten, J.A. It is not a question of recovering back money paid. There might be a difficulty in recovering back money paid, on account of the well known ground which is shortly expressed in the maxim, *Melior est conditio defendantis.*"

The remark is, of course, *obiter*, but even the *obiter* observation of so distinguished a Judge, coupled with the fact that no claim was made to recover back the money, is significant.

The cancellation and delivery-up of the securities in that case resulted from an agreement between parties. The majority of the Court found no evidence of pressure, but I think it is a fair inference from the whole report that, if pressure had been found as a fact, the plaintiff Jones would have been given judgment as of right for cancellation and delivery-up of the securities in question.

The inference I draw from that case is that, even when the agreement in question involves the stifling of a prosecution, the securities given pursuant to it will be set aside on the principles of equity, where the agreement was made under such circumstances that, if otherwise lawful, it would be voidable at the option of the party seeking relief, and, second, that money actually paid over pursuant to such agreement cannot be recovered back.

The next case to which I refer is *Johnson v. Musselman* (1917), 37 D.L.R. 162, determined by the Appellate Division of the Supreme Court of Alberta, consisting of Harvey, C. J., Beck and Walsh, JJ. In that case it was held that, if the offence is of a public nature, no agreement can be valid that is founded on the consideration of stifling a prosecution for it; consequently a promissory note, unless held by a transferee in due course and for value, is not enforceable if given in consideration of stifling a criminal prosecution for the indictable offence of wilfully killing a horse, the property of another.

The equitable jurisdiction to set aside securities as long established in England by *Jones v. Merionethshire Permanent Benefit Building Society* and earlier cases was adopted in Ontario in the case of *Fairweather v. McCullough*, 43 O.L.R. 299, following the *Jones* case, and was applied by this Court in *Erwin v. Snelgrove*, 61 O.L.R. 341.

Applying the law as laid down in these cases, I think that the facts suffice in equity to make the chattel mortgage voidable at

the option of the respondent, and, though it was given for an illegal purpose, to the knowledge of both parties, yet the respondent, having acted under oppression indirectly induced by the appellant, and the parties not being *in pari delicto*, it may still be set aside.

The result is that the defendant's appeal, so far as it relates to the chattel mortgage, must be dismissed.

With further regard to the right of the plaintiff to recover back the \$100 paid by him, I think that the result of the cases I have quoted is that from the earliest times a distinction has been drawn in the courts of common law between cases involving an offence of a public nature and cases of infraction of laws which are calculated for the protection of the subject against oppression from extortion, deceit, etc., by one who had the whip hand.

The result of the cases in which the party complaining has recovered back money paid is summarised in the notes to *Collins v. Blantern* (1767), 2 Wils. 341, 1 Sm. L.C., 13th ed., p. 406, at p. 442, as follows:—

"It must be observed that the generality of this rule is subject to some qualifications, for though, generally speaking, money paid in pursuance of an illegal contract cannot be recovered, yet, 'where contracts or transactions are prohibited by positive statutes, for the sake of protecting one set of men from another set of men; the one, from their situation and condition, being liable to be oppressed or imposed upon by the other; there the parties are not *in pari delicto*; and in furtherance of these statutes the person injured, after the transaction is finished and completed, may bring his action and defeat the contract.'

"So also, if one person has paid money to another in pursuance of an illegal agreement, but under such circumstances that there has been *oppression*, though both parties are *in delicto*, yet they are not *in pari delicto*, and the person who has paid the money may recover it back in an action for money had and received. Thus, where a debtor has, under pressure, secretly paid a sum of money to one creditor to induce him to agree to a composition, the money so paid may be recovered back by the debtor."

In support of that statement the following cases are quoted: *Browning v. Morris* (1778), 2 Cowp. 790; *Jaques v. Golightly* (1776), 2 W. Bl. 1073; *Jaques v. Withy* (1788), 1 H. Bl. 65; *Smith v. Bromley*, 2 Doug. 696, note; *Williams v. Hedley* (1807), 8 East 378; *Kearley v. Thomson* (1890), 24 Q.B.D. 742; *Barclay v. Pearson*, [1893] 2 Ch. 154; *Atkinson v. Denby* (1861), 6 H. & N. 778; *Smith v. Cuff* (1817), 6 M. & S. 160; *Harse v. Pearl Life Assurance Co.*, [1904] 1 K.B. 558; *Unwin v. Leaper* (1840), 1 Man. & G. 747. I have examined each of these cases, and find

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App. Div. that the crime of stifling a prosecution was not an element in any one of them. They are such cases as recovering back money paid in on an illegal lottery; *premissus for life* insurance which proved invalid and illegal by reason of want of insurable interest; the recovery of interest payments which had been made contrary to Masten, J.A. the laws of usury; and the like.

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My consideration of these numerous cases leads me to the conclusion that under all the circumstances of the present case the payment of \$100 having been made in order to affect the administration of public justice, and the plaintiff having thus been guilty of an illegality which affected not merely the defendant but was a crime against the community, the public interest outweighs any personal injustice to the plaintiff arising from oppression and that this branch of the plaintiff's action falls within the general rule as stated by Wilmot, C.J., in *Collins v. Blantern*, 2 Wils. 341: "Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof he shall not have the help of a court to fetch it back again."

It is possible that each case should depend upon its own facts, and upon a balancing by the Court of the public interest on the one hand and of the private injustice on the other. Without laying down any general rule further than I have indicated above, but upon the facts of this particular case, I would hold that the appeal as to the payment of \$100 should be allowed and the plaintiff's action dismissed.

I am not unmindful that at first sight it may seem inconsistent that two different results should accrue from the one corrupt agreement. Any inconsistency is however more apparent than real, as is well pointed out by my brother Orde; and, if there is any real inconsistency, anomalous results are not unknown in our law.

Success being divided, there should be no costs of this appeal. I would not interfere with the costs below.

ORDE, J.A.:—I agree with the judgment of my brother Masten, but desire to add a few words as to his suggestion that there is an apparent inconsistency in granting the plaintiff relief by setting aside the chattel mortgage and at the same time dismissing his claim to recover the money.

There is not, I think, any real inconsistency between the two results. They both rest upon sound principles of justice. So far as the money is concerned the illegal transaction was complete, and the Court refuses to assist the guilty plaintiff. But, while, in a sense, the execution and delivery of the chattel mortgage is also

complete, it is at most merely a security whereby the plaintiff's property is charged with the payment of a sum of money to the defendant. As such it requires enforcement by the defendant against the plaintiff or his property, and it is plain that because of the illegality of the transaction the defendant can never enforce it. In these circumstances to refuse to set the mortgage aside, upon the maxim *in pari delicto potior est conditio defendantis*, would virtually, though indirectly, enable the mortgagee to enforce payment of the security notwithstanding its illegality because the mortgagor could never rid his property of the charge except by payment. There would then be the anomaly of an illegal security being rendered in effect enforceable. To avoid any such extraordinary result the Court must declare it illegal and therefore void. I do not know that any case has arisen where, instead of executing a mortgage, the person seeking to stifle a prosecution has delivered a negotiable security, for example, a bond or debenture, either on its face or by endorsement or otherwise payable to or negotiable by the bearer. Such a security might well stand in the same category as money paid, so that, as no further action against the guilty party who had delivered it would be required for its enforcement, he might be refused any relief.

FISHER, J.A., agreed with MASTEN, J.A.

Appeal allowed on one branch and dismissed on the other.

[APPELLATE DIVISION.]

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ROCCO v. NORTHWESTERN NATIONAL INSURANCE CO.

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Insurance—(Automobile)—Untrue Statement in Application for Policy—Materiality—Policy Issued by Agent of Insurance Company with Knowledge of Untruth—Fraudulent Act of Agent not Covered by his Authority—Estoppel—Knowledge of Agent not Knowledge of Company—Improbability of Agent Communicating his own Delinquency to his Superior Officers.

The plaintiff brought this action upon a policy issued by the defendant company, insuring the plaintiff against loss or damage to an automobile. The policy contained a statement to the effect that the contract of insurance would be void if the applicant knowingly misrepresented or concealed any fact required to be made known. The policy contained the application of the plaintiff, in which he answered "No" to the question whether any company had cancelled or declined to renew or issue automobile insurance to the plaintiff. The plaintiff had in fact, before the date of this policy, suffered the cancellation of two insurance policies on his automobile. The policy now sued upon was issued by an agent of the company, who knew of these cancellations. The application was signed by the

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plaintiff or adopted by him when he brought this action. The agent was in fact retained by the plaintiff to secure insurance for him:—*Held*, that the agent's authority from the company to issue policies for it did not include the right to deliver a policy containing a misstatement which, to his knowledge, would make it void—his was a fraudulent act as against the company not covered by any authority; and, the misrepresentation being material, the company was not estopped, and the policy was void.

Held, also, that notice to or knowledge of an agent is not notice to or knowledge of the company unless the circumstances are such as to justify the opinion that the agent will probably communicate the information to those in charge of the affairs of the company—and in this case it was unlikely that the agent would inform his superiors of his own delinquency.

American Surety Co. v. Pauly (1898), 170 U.S. 133, *J. C. Houghton & Co. v. Nothard Lowe and Wells Ltd.*, [1928] A.C. 1, and *Newsholme Bros. v. Road Transport and General Insurance Co. Ltd.* (1929), 45 Times L.R. 573, [1929] 2 K.B. 356, followed.

AN appeal from the judgment of the First Division Court of the County of Welland (*LIVINGSTONE, Co.C.J.*), dismissing an action for the recovery, under an insurance policy, of \$170.46, the amount of loss or damage sustained by the plaintiff by reason of his automobile being damaged in a collision.

October 15. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, J.J.A.

R. B. Law, for the appellant, admitted that the appellant had made a misrepresentation of fact to the agent of the defendant company, but contended that the misrepresentation was not material. The defendant company was estopped from setting up the misrepresentation, as the agent of the company knew that the appellant was not telling the truth, and the knowledge of the agent is the knowledge of the company: *Bawden v. London Edinburgh and Glasgow Assurance Co.*, [1892] 2 Q.B. 534. The insurance policy was issued by the agent of the company, and there was a binding contract between the appellant and the company as soon as the agent delivered the policy to the appellant and the appellant paid the premium to the agent: *Sowden v. Standard Fire Insurance Co.* (1880), 5 A.R. 290, at p. 301. Section 171 of the Ontario Insurance Act, R.S.O. 1927, ch. 222, does not apply in the present case, because a policy had been issued. Where the agent is a general agent and has authority to consummate the contract, as is so in the present case, by the issue of a policy, and does so, his knowledge is the knowledge of the company: *Newsholme Brothers v. Road Transport and General Insurance Co. Ltd.* (1929), 45 Times L.R. 573. The fact that the agent knew of the previous cancellations, and in spite of that knowledge issued the policy, deprives the company of the right of repudiation.

Hamilton Cassels, for the defendant company, respondent, argued that the misrepresentation of fact is material, as it is part of the contract of insurance. The agent was the agent of the appellant for the purpose of securing a policy of insurance for him. In his endeavour to secure a policy, the agent made application to several companies, and it cannot be said that he acted as agent for each company on each separate occasion: *St. Regis Pastry Shop and Baumgartner v. Continental Casualty Co.* (1928), 63 O.L.R. 337. It was not within the agent's authority to waive conditions in the policy, therefore the company is not bound by the agent's fraudulent act: *Newsholme Brothers v. Road Transport and General Insurance Co. Ltd.* (*supra*). The agent knew that the company would not accept the policy, and therefore his acceptance did not bind the company. If there was a policy in force it was void, as it was issued under a misrepresentation of fact: *Holdaway v. British Crown Assurance Corporation Ltd.* (1925), 57 O.L.R. 70. Apart from the contract of insurance, there was fraud which vitiated the whole contract. If there was a contract, it was cancelled by the company, and the appellant acquiesced in the cancellation: the *Newsholme* case (*supra*).

Law, in reply. The *Newsholme* case does not apply; in that case the agent was the agent of the insured, whereas in the present case the agent was the agent of the insurer.

November 25. *HODGINS, J.A.*—Appeal from the judgment of Livingstone, County Court Judge, sitting in the First Division Court of Welland, dismissing the action.

The plaintiff sues on a policy dated the 10th December, 1928, which contains the following statement:—

“If the applicant knowingly misrepresents or conceals any fact or circumstance required by this application to be made known, the contract of insurance shall be void as to the property or risk undertaken in respect of which the misrepresentation or omission is made.”

In the policy, under the head of statements, appears item No. 7: “Has any company cancelled, declined to renew or issue automobile insurance to the insured?” The answer to which is “No.”

The plaintiff had in fact, previous to the date of this policy, suffered the cancellation of two insurance policies on his motors. One other was apparently cancelled or refused, though no very definite information is given upon that subject. The learned Judge finds as a fact that the plaintiff did sign the application for the policy in question. Even if he did not, the plaintiff sues upon it and so adopts it. It is argued that, because the agent who

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issued the policy, one Blue, knew of these cancellations, as in fact he did, his authority from the company to issue policies prevents the company from disputing that a contract was made with the plaintiff by the policy sued on, and from setting up as a misrepresentation the statement known by both the agent and the plaintiff to be untrue. I do not think the agent's authority included the right to deliver a policy containing a misstatement which, to the knowledge of the agent himself, would make it void. The fact is that the agent was retained by the plaintiff to secure insurance for him, and in doing so his action in actually issuing the policy, knowing of the untruth, was a fraudulent act as against the company, not covered by any authority possessed by him. The evidence indicates, and my own opinion apart from that would be, that the misrepresentation in question was material. The company, to whom the agent returned a copy, repudiated the contract and the agent returned the premium to the plaintiff a month and ten days before action.

I think the action must fail, and both it and the appeal should be dismissed with costs.

MAGEE, J.A.:—I agree.

MIDDLETON, J.A.:—I agree with the judgment of my learned brother Hodgins, but desire to emphasise one point: that notice to or knowledge of an agent is not notice to or knowledge by the company unless the circumstances are such as to justify the opinion that the agent would be likely to communicate the information to those in charge of the affairs of the company. Where the agent is engaged in a fraudulent transaction, and the party seeking to estop the company, by reason of the knowledge of the agent, is aware of his misconduct, he cannot set up the agent's knowledge as being knowledge of the company, for he must know that it is altogether unlikely that the agent would in fact inform his superior officers of his own delinquency.

The law is clearly stated by Mr. Justice Harlan in delivering the opinion of the Supreme Court of the United States in the case of *American Surety Co. v. Pauly* (1898), 170 U.S. 133, at p. 156:—

“The presumption that the agent informed his principal of that which his duty for the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal. In such cases the principal is not bound by the acts or

declarations of the agent unless it be proved that he had at the time actual notice of them, or having received notice of them failed to disallow what was assumed to be said and done in his behalf."

The same thing as applied to a company is stated, with extraordinary clarity, by Viscount Sumner in the case of *J. C. Houghton & Co. v. Northard Lowe and Wells Ltd.*, [1928] A.C. 1, at pp. 18 and 19:—

"Has knowledge then been brought home to the respondent company on which to found the alleged standing by? In the case of a natural person, if information is intelligibly conveyed to and received by him, its source, whether a servant or a stranger, whether he is high or low, matters little, if at all. With an artificial incorporated person it must necessarily be otherwise, for an impersonal corporation cannot read or hear except by the eyes and ears of others. Who are to be the organs, by which it receives knowledge so as to affect its rights, may be specially determined by the articles of its constitution, but otherwise, in a matter where knowledge may lead to a modification of the company's rights according as it is or is not followed by action, the knowledge, which is relevant, is that of directors themselves, since it is their board that deals with the company's rights. The mind, so to speak, of a company is not reached or affected by information merely possessed by its clerks, nor is it deemed automatically to know everything that appears in its ledgers. What a director knows or ought in the course of his duty to know may be the knowledge of the company, for it may be deemed to have been duly used so as to lead to the action, which a fully informed corporation would proceed to take on the strength of it.

"There are two exceptions, however, to this rule, which are now material. The directors, other than the Lowes, did not in fact know till a late date what the Lowes had been doing, and when they found out they took prompt and proper action. The circumstances have been detailed by my noble and learned friend. It is plain, and I think uncontested, that they could not have been made personally liable for any neglect or misfeasance, and, if so, the company cannot be affected as if it had known from them, what they neither knew nor could have been expected to know under the system of domestic management established by the company. On the other hand, the Lowes knew everything all along, and if, by their keeping the matter to themselves, their company could be estopped from denying that it was bound by the 70 per cent. arrangement, they would have relieved themselves and Mr. Prescott from personal liability under their guarantee at the sacrifice of their company's interests. Their silence was accordingly a

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notable breach of duty. It has long been recognised that it would be contrary to justice and common sense to treat the knowledge of such persons as that of their company, as if one were to assume that they would make a clean breast of their delinquency."

Since the above was written, the report of the case of *Newsholme Bros. v. Road Transport and General Insurance Co. Ltd.*, [1929] 2 K.B. 356, has come to hand; it confirms the conclusion arrived at.

Middleton,
J.A.

MULOCK, C.J.O.:—I agree with the judgments of my brothers HODGINS and MIDDLETON.

Appeal dismissed with costs.

[APPELLATE DIVISION.]

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REX v. OLDAKER.

Nov. 25. *Criminal Law—Conviction for Non-support of Wife—Sentence—Criminal Code, sec. 242(3)—Prisons and Reformatories Act, sec. 46.*

A person convicted in Ontario of non-support of his wife, under sec. 242 of the Criminal Code, may be lawfully sentenced to the term of imprisonment mentioned in sec. 46 of the Prisons and Reformatories Act, R.S.C. 1927, ch. 163.

While sec. 242 (3) declares what shall generally be the sentence throughout Canada, sec. 46 enacts an exception applicable to Ontario in the circumstances therein mentioned.

So held, by the Court, upon a motion made on the return of a writ of *habeas corpus* and referred to the Court by a Judge in Chambers under sec. 31 (3) of the Judicature Act.

MOTION, upon the return of a writ of *habeas corpus*, for the discharge of the defendant, who was imprisoned in the Ontario Reformatory under a conviction and sentence by the Police Magistrate for the City of Stratford for non-support of his wife.

The motion was referred to the Court by LOGIE, J., before whom, sitting in Chambers, it was made, because he deemed a decision previously given by RANEY, J., in *Rex v. Dunseath*, not reported, to be wrong, and the point to be of sufficient importance to be considered by a higher court: Judicature Act, R.S.O. 1927, ch. 88, sec. 31 (3).

November 15. The motion was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and GRANT, JJ.A.

N. L. Sukloff, for the appellant, contended that the trial Judge erred in committing the accused to gaol under sec. 46 of the Prisons and Reformatories Act, R.S.C. 1927, ch. 163. The offence with which the accused was charged came within the provisions of sec. 242 (3) of the Criminal Code. Section 46 applies to the Province

of Ontario alone, whereas sec. 242 (3) applies to the whole Dominion. If reference can be made to sec. 46, a person in Ontario committing an offence which comes within the provisions of sec. 242 (3), may be committed to gaol for a longer period than a person who has committed the same offence elsewhere in the Dominion. In criminal matters, the provisions of the Code must be applied unless a statute specifically provides that that statute shall govern. There is no section in the Prisons and Reformatories Act stating that that Act shall govern in the event of it being in conflict with the Code. Reference to Maxwell on the Interpretation of Statutes, 7th ed., p. 244; *Attorney-General v. Horner* (1884), 14 Q.B.D. 245, at pp. 256 and 257. The words of a statute must be clear and precise if reference to another statute is to be inferred: *Carr v. Fowle*, [1893] 1 Q.B. 251; *Underhill v. Longridge* (1859), 29 L.J.M.C. 65. The statute not being clear and obvious, reference should not be made to it.

Edward Bagly, K.C., for the Crown, respondent, contended that the trial Judge obtained jurisdiction to commit the accused to gaol for a term longer than that provided by sec. 242 (3) of the Criminal Code, by virtue of sec. 46 of the Prisons and Reformatories Act. This section is not in conflict with the provisions of the Criminal Code, for the Legislature had sec. 242 (3) of the Code in mind when it enacted this section. These sections can and must be read together, and the trial Judge was not limited to the provisions of the Code in committing the accused to gaol.

November 25. The judgment of the Court was read by MULOCK, C.J.O.:—The question involved in this appeal is whether a prisoner convicted under sec. 242 of the Criminal Code may be lawfully sentenced to the term mentioned in the Prisons and Reformatories Act, R.S.C. 1927, ch. 163, sec. 46.

The prisoner was convicted by the Police Magistrate for the City of Stratford for non-support of his wife, and, on the 23rd April, 1928, was sentenced to the term of imprisonment provided by the Prisons and Reformatories Act, namely, one year in the Ontario Reformatory and an indeterminate period thereafter of not more than two years less one day.

The prisoner, contending that the appropriate sentence was that provided by the Criminal Code, namely, a fine of \$500 or one year's imprisonment, or both, claimed to be illegally detained in the Ontario Reformatory, and on the 25th October, 1929, applied for and obtained from the Court a writ of *habeas corpus* directing the keeper of the reformatory to have the body of the prisoner before a Judge in order that the legality of his detention might

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be determined, and on the 1st November, 1929, upon the return of the writ, on the application by the prisoner for his discharge from the Reformatory, Logie, J., deeming a decision previously given by Raney, J., in *Rex v. Dunseath* to be wrong, and the point to be of sufficient importance to be considered by a higher court, ordered that, pursuant to the provisions of R.S.O. 1927, ch. 88, sec. 31, subsec. 3, the application be referred to the Appellate Division for adjudication, and thus the case comes before this Court.

Section 46 of the Prisons and Reformatories Act reads as follows:—

“Every court in the Province of Ontario, before which any person is convicted for an offence against the laws of Canada, punishable by imprisonment in the common gaol for the term of three months, or for any longer time, may sentence such person to imprisonment for a term of not less than three months and for an indeterminate period thereafter of not more than two years less one day in the Ontario Reformatory instead of the common gaol of the county or judicial district where the offence was committed or was tried.”

The meaning of this section appears to me quite plain. Under the circumstances mentioned in sec. 46, the sentence fixed by the Prisons and Reformatories Act is alternative to that fixed by the Code. Whilst sec. 242, subsec. 3, of the Code declares what shall generally be the sentence throughout Canada, sec. 46 of the Prisons and Reformatories Act enacts an exception to its generality, the exception being that in the Province of Ontario every court may, under the circumstances mentioned in sec. 46, sentence a person to imprisonment in the Ontario Reformatory instead of the common gaol, and for the term provided in sec. 46 in lieu of that mentioned in sec. 242, subsec. 3, of the Code.

I therefore think the motion of the prisoner should be dismissed.

Motion dismissed.

[APPELLATE DIVISION.]

1929.**REX v. HARCOURT.**Nov. 25.

Criminal Law—Circulation by Officer of Mining Company of False Statements to Induce Persons to Become Shareholders—Criminal Code, sec. 414—Evidence—Absence of Knowledge of Falsity—Reliance on Reports of Mine-manager—Procedure Adopted by Crown—Particulars of General Charges.

The conviction of the defendant, under sec. 414 of the Criminal Code, for that he, being an officer of a mining company, did unlawfully

circulate or publish prospectuses, statements, and accounts which he knew to be false, in order to induce persons to become shareholders in the company, was quashed on appeal.

Held, that upon a prosecution under sec. 414 it must be shewn that the accused knew that the statements complained of were false in a material particular; the falsity of the statements and the knowledge of the falsity are essential factors in guilt, and are matters of proof; an intention to defraud is also essential; but, when it is proved that the statements are false to the knowledge of the accused, the intention to defraud may be presumed.

Regina v. Birt (1899), 63 J.P. 328, *Regina v. Gurney et al.*, Finlason, at pp. 215, 233, *Regina v. Directors of the City of Glasgow Bank*, Couper, at pp. 433, 434, 435, *Dovey v. Cory*, [1901] A.C. 477, *In re City Equitable Fire Insurance Co. Ltd.* (1924), 40 Times L.R. 853, 856. and *Lanier v. The King*, [1914] A.C. 221, referred to.

It appeared that the accused, who was the managing director of the company, in the statements which he made, adopted and relied upon reports made by the mine-manager, which he believed to be accurate and true:—

Held, that his statements did not go beyond the meaning to be attributed to the mine-manager's reports of the result of the work upon the ground; and it could not therefore be said that the accused published statements which were false to his knowledge in any material particular.

Even assuming the assay-sheets attached to the mine-manager's reports to be true—of which there was no evidence—they did not discredit the mine-manager and his reports.

Remarks upon the faulty procedure of the Crown in its manner of giving particulars of the general charges made in the indictment, in the attempt to reserve to the Crown the right to add further particulars, and in the vague generalisation that the whole tenor of the accused's statements was misleading and false, etc.

AN appeal by the defendant from his conviction in the County Court Judge's Criminal Court for the County of York, under sec. 414 of the Criminal Code, for that he, being an officer of the Jackson-Manion Mines Limited, did unlawfully circulate false prospectuses, statements, etc., to induce persons to become shareholders.

Section 414 reads as follows:—

414. Every one is guilty of an indictable offence and liable to five years' imprisonment who, being a promoter, director, officer or manager of any body corporate or company, either existing or intended to be formed, makes, circulates, or publishes, or concurs in making, circulating or publishing any prospectus, statement or account which he knows to be false in any material particular, with intent to induce persons whether ascertained or not to become shareholders or partners, or with intent to deceive or defraud the members, shareholders or creditors, or any of them, whether ascertained or not, of such body corporate or company, or with intent to induce any person to entrust or advance any property to such body corporate or company, or to enter into any security for the benefit thereof.

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October 17, 18, 28, 29, 30, 31, and November 1. The appeal was heard by MULOCK, C.J.O., MAGEE, HODGINS, MIDDLETON, and ORDE, J.J.A.

D. L. McCarthy, K.C., *R. S. Robertson* K.C., and *J. W. Pick-up*, for the appellant. Under sec. 414 of the Criminal Code, the Crown must prove: (1) the falsity of the statements made by the appellant; (2) that he made the statements knowing them to be false; (3) that the statements were made with the intent to induce persons to become shareholders. The statements made by Harcourt were based upon letters which he received from the mine-manager. He had implicit faith in the mine-manager, who was a qualified engineer. In order to prove the falsity of these letters, it was necessary for the Crown to prove the truth of the assay-sheets. This the Crown did not attempt to do. Being a criminal case, the onus was upon the Crown to prove all material facts. The truth or falsity of the assay-sheets was a material fact. The Crown did not produce all the assay-sheets, and so those which were not produced might have proven that the appellant's statements were correct. Expert evidence shewed that, for an assay to be accurate, the samples must be taken at regular intervals. The samples in the present case were not taken at regular intervals, and so the assays are worthless. If Harcourt had examined the assay-sheets they would not have proven to him the falsity of the mine-manager's letters. The appellant did not make statements knowing them to be false. The letters sent by the mine-manager justified the statements made by Harcourt, who had no reason to doubt the accuracy of these letters. Nothing occurred to arouse Harcourt's suspicion regarding the progress and the outlook at the mine. He, along with several directors, visited the mine, and it looked very promising. It is unlikely that Harcourt would knowingly make false statements when he was aware that two independent engineers were inspecting the property at the time his statements were published. A fair reading of Harcourt's statements would not have the effect of misleading the public. The Crown did not prove that the public was misled by Harcourt's statements. One of the witnesses called by the Crown to prove that he had been misled by these statements admitted that he was not only influenced to purchase shares by the reports in the press, but also by being advised to do so by a broker who was not interested in the mine.

Peter White, K.C., for the Crown. The false statements published upon which the Crown relies to support the conviction are as follows: (a) No free gold was noted by either the sampler or the assayer. The accused used the terms "visible gold" and

"free gold" as meaning the same thing. He knew that visible gold would be noted on the assay-sheets after the 19th September. He could have ascertained from the assay-sheets that visible gold was being noted after that date. The accused knew that this statement was untrue, and admits that if he had looked at the assay-sheets he could not truthfully have made the statement. (b) All drifting done on both levels was in ore. The plan shews that drifting on the south drift and the south drift slash on the 250-foot level was continued 38 feet into porphyry. Letters from the mine-manager to the accused shew, and the accused knew of his own knowledge from what he saw at the mine, that the drift was off the vein. (c) "Extremely high grade ore is being encountered in this ore shoot." The accused knew that this statement was untrue because from his visit to the mine he had seen conditions as they really were and that much of the 250-foot level was not high grade. (d) "There have been no features developed to date of a detrimental character, and nothing whatever to lead any one to believe that the property will not become one of the outstanding gold mining producers in northwestern Ontario." This is not an opinion but a statement of fact which was not in accordance with but distinctly contrary to conditions that the accused knew existed at that time. The proof of the falsity of the statements does not depend upon the assay-sheets. Intent is to be inferred from the fact that the accused was to gain personally from the sale of shares in an inflated market, and that he did actually so profit, according to the evidence.

November 25. MIDDLETON, J.A.:—An appeal by the accused, convicted before his Honour Judge O'Connell in the County Court Judge's Criminal Court for the County of York, on the 26th day of June, 1929, of offences against sec. 414 of the Criminal Code, leave to appeal upon a question of fact having been given by the Court.

The accused was charged "for that he, in or about the year 1928, at the city of Toronto, in the county of York, being a promoter, director, officer or manager of a body corporate or company, to wit, Jackson-Manion Mines Limited, unlawfully did make, circulate or publish, or concurred in making, circulating or publishing, prospectuses, statements or accounts which he knew to be false in material particulars, with intent to induce persons to become shareholders or with intent to deceive or defraud the shareholders or creditors, or any of them, of such body corporate, or company, contrary to the Criminal Code, section 414."

Upon particulars being required, the Crown counsel wrote a letter to the solicitors representing the accused, advising them

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1929. purposes to rely on the following statements or accounts made by
REX the accused."

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HARCOURT. Three documents are then identified by reference to their dates
Middleton, and exhibit numbers at the preliminary hearing, and it is then
J.A. said :—

"The matters contained in the said statements alleged to be false are those underlined in red ink in the copies which I enclose you herewith. In addition thereto, the Crown proposes to allege that the whole tenor of the said statements is misleading and false, and calculated to deceive the ordinary person reading the same It must be understood that the Crown is not hereby precluded from relying on such further and other prospectuses, statements or accounts, as may hereafter appear desirable or as counsel may advise."

Concerning this form of indictment and the method of supplying particulars, I propose to say something later.

Three documents were referred to and put in as evidence at the trial, viz. :—

(1) An undated report, probably actually made on the 14th October, addressed by Harcourt, as managing director of the company, to his co-directors, purporting to be a summary of operations on the mining property in question up to the 30th September, 1928. It is a long document—over 20 folios—containing much that is not complained of. The operations underlined in red ink cover many details concerning the work said to have been done upon the mine, and three special matters much referred to upon the trial, namely: an estimate that "the average grade of ore drifted through to date will be slightly in excess of \$12 per ton; secondly, that this is based on the assays made respecting the spectacular occurrences of free gold which are being continuously encountered under ground; and, thirdly, that there have been no features developed to date of a detrimental character, and nothing whatever to lead any one to believe that the property will not become one of the outstanding gold mining producers in north-western Ontario.

In the second document, being a report of an informal meeting of the directors, probably made about the 4th November, Harcourt states two things which are complained of:—

First: "Reports from the mine are that we have a property of merit; that values on the 125-foot level are fairly consistent and will mill better than \$12 per ton; the vein on the 250-foot level is considerably disturbed, but places where it was in place made good commercial value."

The second statement in this letter objected to is: "An estimate was made by the superintendent and the assayer of ore reserves, placing this at \$1,600,000 for a depth of 200 feet."

The third document is a long and somewhat controversial document of a later date, claiming to be a reply to publications criticising the first document mentioned in the particulars, in which the affairs of the mine in question were discussed. This purports to give facts and information upon which the first document mentioned was based. It is very largely a recapitulation of correspondence received from the engineer who was acting as mine-superintendent, his statements in various reports and communications being quoted verbatim. Only one statement in this long document is complained of:—

"In reference to the channel assays, as no channel assay was considered in which either the sampler or assayer noted free gold, due allowance must be made for the high grade continually being found. The channel assays previously reported did not give the real high or real low channels, but any inference that could be drawn from them was covered by the estimate of \$12 ore, otherwise a much higher estimate must have been made."

The trial before the learned County Court Judge lasted many days. The proceedings cover over 1,200 pages. The judgment pronounced by the learned Judge covers over 50 foolscap pages, and he finds the accused guilty because, in the learned Judge's opinion, he (the accused) ought to have known, had he examined the reports of the engineer and the accompanying assay-sheets, that the statements in the letters relied upon were untrue; and, in addition to this, his guilt is found in respect of certain specific matters which I shall hereafter deal with.

Underlying the whole course of proceedings at the trial was the endeavour to fix guilt upon the accused, upon the theory that he must have known, were it not for gross negligence or incompetence, that the information he received from Thomson, the mine-manager, was unreliable. This is indicated by what is said in the judgment:—

"A glance at the assay-sheets particularly would shew that the figures contained in Thomson's letters were by no means averages of the vein, and it is quite apparent as well that it is a very simple matter to make the necessary computations of the assay-sheets in order to ascertain what the averages are. I think there is no doubt that a person of ordinary intelligence, and especially a person with engineering experience, would have practically no difficulty whatever, if he applied his mind to it, to ascertain from the assay-sheets what the true facts were; and, while these assay-

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App. Div. sheets were sent from the mine to Harcourt as the managing
1929. director of the mine, for the purpose of giving him the necessary
REX information for the proper conduct of the affairs of the company
v. to pass on the information to his directors, it seems to me almost
HARCOURT. incredible that a man occupying that position, for which he was
paid a substantial salary, and having the professional training that
Middleton, J.A. he had, would not look at these assay-sheets to see if the information
contained in the letters conformed therewith."

If one turns to the statute under which the prosecution is had, it will be found to be essential that it should be shewn that that which is complained of the accused must know to be false in a material particular. The falsity of the statement and the knowledge of the falsity are essential factors in guilt, and are matters of proof. An intention to defraud is also essential; but, when it is proved that the statements are false to the knowledge of the accused, then the intention to defraud may be presumed. See *Regina v. Birt* (1899), 63 J.P. 328.

This statute had its origin in the English Larceny Act, 24 & 25 Vict. ch. 95, sec. 84. Some verbal amendments have since been made, but these in no way affect the case in hand.

Under this statute, one of the early prosecutions was that of *Regina v. Gurney et al.*, arising out of the failure of the great firm Overend Gurney & Co. The proceedings at the trial are published in a volume by Finlason, the well-known law reporter, and the charge of Lord Chief Cockburn is still referred to as "an admirable summing-up" (Palmer's Company Law, 13th ed., p. 219). There, the Lord Chief Justice says (p. 215) :—

"In a case of this kind, we are, as it were, upon the very confines which separate the civil and the criminal law, and we must take care that we do not overstep the boundary line. It is one thing that a man may make himself liable to an action, or may be liable to have a contract which he seeks to enforce held to be bad, because he has stated something which went beyond the exact line of truth, or has concealed some material fact which ought to have been made known to the other contracting party; but more than this is required to support this charge. A man may honestly misrepresent—that is to say, he may state as true something which he believes to be true, but which turns out to be untrue. If he has given a warranty, or has entered into a civil contract founded on the assertion of the fact in question, he may be liable in a civil action to be defeated; but that would not be sufficient for the present purpose. Here, you must be satisfied that that which is alleged to have been misrepresented was known to the defendants to be false, and that, acting upon that knowledge,

and with the deliberate intention to deceive and defraud, they did that which is alleged to have constituted the criminal offence for which they are now put upon their trial."

Again, at p. 233, it is said:—

"It is not a question of what these things were actually worth, or what they have proved to be worth—the question is, What was honestly believed at that time to be the worth of this business and of this property? That is what we have to endeavour to arrive at; and to judge, as the learned counsel proposes to do, simply by the events which have taken place since, would be, I think, very likely to lead you to conclusions which a more careful and more correct analysis would shew to you to be unfounded and unjust. We are dealing with a question of fraud, and we must therefore see what was the real belief at the time these estimates were made and these transactions were effected."

And at p. 237:—

"As I have before said, it is not because the defendants may have taken a too sanguine view of their affairs and of the prospects of this concern, that therefore they are to be visited with a criminal prosecution. You must be satisfied that they knew that this concern was worthless; and that, knowing it to be so, they passed it off upon the public."

I also find much valuable guidance in the proceedings against the directors of the City of Glasgow Bank—the trial reported in a volume issued by Couper in 1879.

In the charge of the Lord Justice-Clerk, Lord Moncreiff, at p. 435, it is said:—

"Now what the prosecutor has undertaken to prove, and says that he has proved, is not that these directors were bound to know the falsity of the statements in the balance-sheets—not that they lay under obligations to know it, not that they had the means of knowledge,—but that, in point of fact, they did know it; and that is what you must find before you can convict the prisoners of any part of the offences attributed to them. You must be able to affirm in point of fact, not that they had a duty and neglected it, not that they had the means of information within their power and failed to use them, but that, as a matter of fact, when that balance-sheet was issued, they knew that the statements contained in it were false. I say that, because there has been some phrasology used in the course of this trial that would seem to indicate that a constructive knowledge was all that was required for such a case. Constructive knowledge might be quite sufficient if we were dealing here simply with an action for civil debt or civil reparation; for what a man is bound to know he shall be held to have known. But that has no place at all when a man is

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charged with crime. His crime is his guilty knowledge, and nothing else. He is charged with personal dishonesty, and you must be able to affirm that on the evidence before you can convict him; but while I say that, gentlemen, I by no means mean to say that the knowledge which you must find must necessarily be deduced from direct evidence of it. You are not entitled to assume it; but you are entitled to infer that fact, as you are entitled to infer any other fact, from facts and circumstances which shew and carry to your mind the conviction that the man when he circulated, or when he made that balance-sheet, knew that it was false. You must be quite satisfied, however, before you can draw that conclusion, not merely that it is probable, or likely, or possible that he knew, but that he did, in point of fact, know the falsehood of which he is accused."

Concerning another aspect of the case, it is said, at pp. 433, 434:—

"He is entitled to trust the officials of the bank who are there for that purpose, and as long as he has no reason to suspect the integrity of the officials, it can be no matter of imputation to him that he trusts to the statements of the officials of the bank acting within the proper duties of the department which has been entrusted to them. You may assume that."

This statement anticipates the decision of the House of Lords in *Dovey v. Cory*, [1901] A.C. 477.

The knowledge of the untruth of the statement complained of is, by the very terms of the statute, essential before there can be guilt, and no authority is needed, yet it is, perhaps, worth while to refer to the decision in *In re City Equitable Fire Insurance Co. Ltd.* (1924), 40 Times L.R. 853, where it is said (p. 856):—

"A person does not wilfully misconduct himself unless he knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be) a particular thing, and yet intentionally does it or fails or omits to do it, or persists in the act, failure, or omission regardless of the consequences."

David M. Thomson was employed as mine-superintendent and spent all his time in supervising the affairs at the mine. He was a qualified mining engineer of considerable experience. He reported from time to time upon the work at the mine. His reports are full of detail, and there is nothing that a most careful perusal of them suggests in any way indicating that he was not, in addition to being thoroughly competent, perfectly honest. His reports were accepted by Harcourt and his co-directors without doubt or question.

The first of the three documents complained of is built up

upon information contained in Thomson's reports. The second of the documents complained of is of very minor importance. The third document is almost altogether a quotation *ipsissimis verbis* from Thomson's letters and reports. There is no evidence whatever that anything said by Thomson was in fact untrue.

Thomson was not called as a witness. A prosecution was launched against him, but he was not placed upon trial until after this case was over, when the prosecution failed, it is said, because in the view of the learned Judge he did not come within the purview of the statute.

Attached to some of Thomson's letters were assay-sheets. There is no evidence whatever that these assay-sheets are true. The assayer was not called; nor were they in any way proved. They were put in at the trial without proof because attached to Thomson's letters. Underlying the whole judgment of the trial Judge is the assumption that these sheets are true, and Thomson's reports are not true. I do not at all share the opinion expressed by the Judge that, even assuming these sheets to be true, they in any way discredited Thomson and his reports. Thomson is evidently a man of ability. It is inconceivable to me that he would send with his reports assay-sheets which would reveal the falsity of the statements contained in the report. The learned Judge seems to think that these assay-sheets do shew this. I cannot follow his reasoning, and I do not think that the learned Judge has at all appreciated the true significance of the assay-sheets. In every case the figures freely given by Thomson in his reports also appear in the assay-sheets.

In considering these sheets, it must be borne in mind that the matter of concern to the mine-owners was the existence of a valuable vein of ore. The assays, when in the ore body, shewed a substantial quantity of valuable mineral. There was much exploratory work done, and in the course of this exploratory work many samples were taken which proved of little value or of no value. This did not necessarily indicate the value of the commercial ore, and nothing, it seems to me, is accomplished by bunching these together, and condemning the mine because, when the total is divided by the number of assays, an unsatisfactory result is indicated.

Before any result can be arrived at, it is necessary that there should be knowledge of the bulk of material corresponding with the particular assays. I refrain from entering upon a discussion which must, I think, in any event be futile. I can see nothing to indicate that Harcourt did not honestly believe that in Thomson's reports he had an absolutely reliable and accurate statement of the result of the work upon the ground. It is of great import-

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ance to bear in mind that, when once this conclusion is arrived at, substantially all that Harcourt is accused of is got rid of. All that remains is of very minor importance.

I think it is right that I should deal with some of the remaining matters of which much was made in the course of the trial and in the very elaborate argument before us.

Harcourt stated, and based his statement entirely upon the report of Thomson, that the ore upon the surface would average better than \$12 per ton. This is justified if Thomson's report is accepted. The real significance of this statement is that it is probably the one statement of fact which would be regarded by the ordinary individual as of importance. It is the one thing seized upon by three newspapers who published the report as of sufficient importance to be given prominence in the captions of the articles published by them. This valuation of the ore is, however, of great importance when considering the next item to be mentioned.

Thomson in his letters instances ore values obtained from assays. He does not call them representative assays, but the context shews that this is what he meant. He did not mean, nor do I think Harcourt meant, that these figures represent the average value of the ore. This could not be, for these figures far exceeded the \$12 figure.

Much is made of the fact that in Harcourt's summary of Thomson's reports he introduced the word "representative" as applicable to these higher values. I very much doubt whether this was the representation of a material fact, once it is plain that the word "representative" did not mean and could not mean "average." I am not prepared to affirm a finding of guilt upon this ground.

Then it was said that the estimate of the total amount of ore in reserves was altogether excessive. This was entirely justified by Thomson's estimate and report. In fact what he said is on its face a quotation from this report. An attempt was made to discredit this entirely by the evidence of an expert who had never been upon the ground, and he made a theoretical calculation on estimated measurements. I do not dwell upon this, because such an estimate ought not to be accepted without having accorded to Thomson an opportunity of shewing upon what he based his calculations.

Harcourt was not a criminal because he accepted and believed the information given him by Thomson.

Then it was said that the statement that there has been no feature developed to date of a detrimental character, etc., is not justified by the statement in Thomson's letter, "I most emphatically reiterate my original opinion, backed up as it is now by sound

foundation of known facts, that in this property you have a mining prospect with unrivalled possibilities of becoming a feature of Canadian mines."

When the surrounding circumstances are understood, it is plain that Harcourt's statement does not go beyond what was the meaning of Thomson's. When the shaft was sunk from the 125-foot level to the 250-foot level, with the object of ascertaining whether the ore body extended to the greater depth, there was, for a few weeks, much anxiety, as the vein was not at once located, and in Thomson's reports this anxiety is shewn. In the report last before that which I have quoted, it is said that there are indications that the vein has almost been reached. In this report it is said:—

"The vein is found." "The vein did not shew any signs of a slip having cut it off, but on the contrary was a gradual coming together to form the compact vein as we have it of many small stringers which we drifted along following their ever strengthening trend as we got north, until at 100 feet we had the full width of face, 7 feet, all in well fractured and typical Jackson-Manion quartz. . . . Several engineers of note have viewed this, and without exception have said it was the finest drift face they had ever seen."

Harcourt did not go beyond this.

Very much was made of the fact that in the circular letter Harcourt said that the assays had been taken irrespective of free gold or visible gold. According to Thomson's reports up to almost the last, this was so, but in the last letter from him he stated that one assay did include some visible gold. Harcourt ignored this in his report. I do not think that this is a "material particular" within the statute, bearing in mind the very large number of assays taken, and I am not satisfied that this sample was taken into consideration in any of the figures given by Thomson or by Harcourt. The assay-value in which this occurred was by no means spectacular, and could not have affected the general result in any appreciable degree.

Upon all these grounds, I am of opinion that the appeal succeeds, and that the accused is entitled to be discharged.

Before parting with this case, I desire to draw attention to what I think is very faulty procedure on the part of the Crown.

The indictment as laid contains no information, but follows the wording of the statute. This may be very well if it is supplemented by adequate particulars. In truth the situation is as though a man were charged with forgery or with theft and then was tried without any information as to what it was that was forged or what it was that was stolen. If the accused is acquitted,

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or if he is convicted, it would be difficult to plead the acquittal or the conviction in answer to a subsequent charge. The particulars contemplated by the Code are a formal document filed in the Court, and of record, and a letter between solicitors or counsel is neither adequate nor proper.

Even assuming that the latter could be regarded as particulars, it fell far short of that which is required in any court where any regard is paid to the strict requirements of practice. When a statement is alleged to be false, that which constitutes the falsity should be shewn. Here the underlined portions of the various documents contain, perhaps, 100 statements of fact. It is not fair to the accused to state generally that these are untrue. The exact portion that was untrue should have been pointed out. If reference is made to the books of practice, e.g., Archbold's Criminal Pleading, 27th ed., p. 633, or to any of the cases to which I have referred, a proper form of particulars will be found. I am convinced that, had adequate particulars been delivered in this case, the certainty which would have resulted would have prevented the rambling and discursive evidence which was brought before us, and would have materially shortened the tedious argument to which we were compelled to listen.

Another vice is the attempt to reserve to the Crown the right to add further particulars, and the vague generalisation that the Crown alleged "the whole tenor of the statements to be misleading and false, and calculated to deceive an ordinary person reading the same." If this is compared with the requirements of the statute, the reason for this observation will be apparent.

The Crown, having given particulars, should be confined to the particulars given, unless leave to deliver further particulars is obtained, upon a proper case being made out justifying such leave.

MULOCK, C.J.O., and MAGEE and ORDE, JJ.A., agreed with MIDDLETON, J.A.

HODGINS, J.A.:—I desire, while expressing my entire concurrence in the opinion of my brother Middleton, to put shortly the conclusions to which I have independently arrived, which I do by consent, pursuant to the statute.

A conviction under sec. 414 of the Criminal Code, which deals with false statements by promoters, directors, etc., of companies, can only be secured if proof is given that (1) the statements are in themselves false in some material particular, (2) and not only so, but false to the knowledge of the accused, and (3) made with intent to defraud, etc.

(1) The statements which the Crown set out to prove contain language partly vague and partly specific, and this is due to the

fact that definite particulars were not given either in the indictment or in the letters which were assumed (and wrongly assumed) to be sufficient to take the place of the particulars required by the Criminal Code.

(2) I examined with care each of the reports or communications made by the accused, three in all, and found, after consideration, that they fairly represented the information which the accused had received from Thomson, the mine-manager, recounting the weekly work being done below the surface and the conditions and difficulties encountered, as well as any encouraging features. The Crown did not call Thomson as a witness, and his character, trustworthiness, and experience were not in any way impugned, nor did any witness say his information was wrong or misleading.

(3) The assay-sheets which accompanied Thomson's letters were the result of the tests made by the assayer, Johnstone, who, likewise, was not called as a witness. It was argued that an examination of these sheets would prove that Thomson's statements were not true or were misleading; but, on examination, the figures given by him, and reproduced by the accused, appear on these assay-sheets. These sheets were not proved to be in fact true and correct; but, whether they appeared to differ or not, it was essential for the Crown to verify them and to establish that they shewed conditions differing from Thomson's reports and figures or threw some adverse light upon them. No attempt was made to do this, and so they could not be looked at as if they had been properly verified as true tests and valuations, discrediting Thomson's information.

(4) Under these circumstances, there was nothing to deprive the accused of his right to rely on Thomson's information and truthfulness, if he did so in good faith (and he says he did), and to rest upon the absence of any attempt to prove the statements to be false or even inconsistent with the unproved and unverified assay-sheets.

(5) The learned trial Judge, if I may respectfully say so, based his findings upon two incorrect assumptions: first, that the assay-sheets disagreed with the information supplied by Thomson (who himself sent them to the accused); and, secondly, that the accused, having these sheets before him, was charged with knowledge of their contents and of their inconsistency with Thomson's communications. As the assay-sheets were not proved to be true and were on their face consistent, these assumptions fall to the ground.

The cases referred to by my brother Middleton, to which I may add *Lanier v. The King*, [1914] A.C. 221, as to "a proposition

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App. Div. of constructive crime," completely answer the second assumption
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Negligence—Collision of Vehicles upon Highway—Runaway Horse—Allegations of Negligence—Injury to Person Standing upon Truck—Evidence—Findings of Jury—Trial—Motion for Nonsuit—Res Ipsa Loquitur—Waiver of Application of—Absence of Evidence as to Tendency of Horse to Run away—Fault not Imputable to Owner—Conduct of Driver—Speculation of Jury Embodied in Finding.

A horse owned by the defendant company, attached to a bread-wagon, ran away upon a city street and came into contact with a truck upon which the plaintiff was standing, causing him to fall to the pavement and sustain serious injuries. In an action to recover damages for his injuries, the only allegations of negligence respecting which any evidence was adduced on behalf of the plaintiff were: (3) that the horse was not kept under proper control so as to prevent the accident; and (6) that the driver of the wagon failed to make proper use of the appliances for stopping the horse. At the trial, the jury, in answer to questions, found: (1) negligence on the part of the defendant company; and (2) that the negligence which caused the accident was that, "having regard to the restlessness of the horse, which necessitated it being held by M., the driver failed to exercise proper care, as follows: he should not have entered the wagon but have taken the horse by the head and led it to the kerb on the north side, then he should have proceeded down the hill, with the right-hand wheel close to the kerb, so that in case of emergency the wheel could be turned against the kerb to act as a brake:"—

Held, that the second finding of the jury negatived any negligence except that stated in the second finding, which would properly fall under the third allegation of negligence.

Upon a motion made for a nonsuit at the close of the plaintiff's case, upon which judgment was reserved until after the jury's verdict:—*Held*, that the plaintiff's counsel, having elected to adduce evidence tending to shew negligence on the defendant company's part, waived the application of the maxim *res ipsa loquitur*; and *quare* whether that maxim applies in the case of an accident occurring on the highway by reason of a collision between vehicles.

And *held*, that there was no evidence upon which a jury could reasonably find negligence on the part of the defendant company: the accident was clearly the result of the horse running away, and there was no evidence that it was wild or vicious or had any tendency to run away before the accident, and therefore knowledge of vice or wildness could not be imputed to the company.

Nor was there evidence of negligence on the part of the driver: there was nothing to bring to his notice that there was any probability of the horse running away or becoming unmanageable.

Semblé, that the second finding was unsupported by the evidence and should be treated as a speculation or a theory of the jury as to how the accident might have been avoided, and not a finding of fact.

Appeal allowed.

[WRIGHT, J.]

CANIVET v. BROWN'S BREAD LTD.

AN action for damages for alleged negligence of the defendant company which caused personal injury to the plaintiff.

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The action was tried before WRIGHT, J., with a jury, at a Toronto sittings.

E. C. Bogart, for the plaintiff.

T. N. Phelan, K.C., for the defendant company.

November 28. WRIGHT, J.:—The action was brought to recover damages from the defendant company owing to alleged negligence on its part in that one of its horses attached to a bread-wagon ran away and collided with a truck on which the plaintiff was standing, causing him to fall to the pavement and sustain serious injuries.

At the close of the plaintiff's case, counsel for the defendant company moved for a nonsuit, on the ground that there was no evidence upon which the jury could reasonably find negligence on the part of the defendant company. I reserved judgment on this motion and allowed the case to go to the jury.

No evidence was called on behalf of the defendant company, so that the motion falls to be determined upon the evidence adduced on the plaintiff's behalf.

The questions submitted to the jury and their answers thereto are as follows:—

"(1) Was the accident to the plaintiff caused by any negligence on the part of the defendant company? A. Yes.

"(2) If your answer to number 1 is 'yes,' then state what was the negligence which caused the accident? A. Having regard to the restlessness of the horse, the driver failed to exercise proper care when starting down the hill. But the jury feel that the driver, after having started, was hampered by the construction of the wagon.

"(3) At what sum do you assess the damages to the plaintiff? A. \$1,500."

When the jury returned I expressed the opinion that the answer to the second question was too vague and indefinite, and requested them to retire and answer the question more specifically. The jury retired and answered the second question in the following terms:—

"Having regard to the restlessness of the horse, which necessitated it being held by McMillan, the driver failed to exercise proper care, as follows:—

1. He should not have entered the wagon but have taken the horse by the head and led it to the kerb on the north side, then he should have proceeded down the hill, with the right hand wheel

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Upon these answers the plaintiff's counsel moved for judgment for the sum of \$1,500, and I heard further argument from counsel on both motions.

Upon the argument it was admitted by counsel for the plaintiff that the only allegations of negligence respecting which any evidence was adduced on behalf of the plaintiff were those set out in para. 5, subparagraphs. 3 and 6, of the statement of claim, which read as follows:—

"(3) The defendant's horse was not kept under proper control so as to prevent the accident that took place.

(6) The defendant, its servant, agent or employee, failed to make use of the appliances for stopping the said horse and allowed it to proceed madly down the hill, causing serious damages to the plaintiff."

In view of the answer of the jury to question number 2, I do not think it advisable or necessary to deal with the negligence alleged in subparagraph. 6, already cited, as that answer negatived any other negligence except that stated in such answer, which would properly fall under subparagraph. 3, already cited.

I am not unmindful of the fact that the motion for nonsuit should be dealt with upon the case as it stood at the close of the evidence, and not upon the findings of the jury. However, it is obvious that it would be useless to discuss any other acts of alleged negligence than those found by the jury.

While I allowed the case to go to the jury, I reserved my judgment on the motion for nonsuit, in which course I am justified under the decision in *Skeate v. Slaters Ltd.*, [1914] 2 K.B. 429.

Dealing then with the case as presented by the evidence on the plaintiff's behalf, I have to determine whether there was any evidence upon which a jury might reasonably find negligence on the part of the defendant, and not a mere scintilla of evidence, which under the authorities is not sufficient to entitle the plaintiff to have his case submitted to a jury.

At the trial I was of the opinion, and so suggested to the plaintiff's counsel, that, if he shewed that the horse owned by the defendant and driven by its servants, while on the wrong side of the road, ran into and injured the plaintiff, he could rest his case there, and the onus would then be upon the defendant to shew that everything possible had been done by the driver to avoid such collision and to negative any negligence on his part. The plaintiff's counsel, however, elected to adduce evidence tending to shew negligence on the defendant's part. Having taken that course, he waived the application of the maxim *res ipsa loquitur*. See *Curry*

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In any case there is some doubt as to whether the maxim *res ipsa loquitur* applies in the case of an accident occurring on the highway by reason of a collision between vehicles. See Beven on Negligence, 4th ed., p. 138.

As already stated, the plaintiff having elected to establish specific acts of negligence, the case has to be dealt with upon that basis.

The only evidence given which could by any possibility prove or indicate negligence was that given by the witnesses Ernest McMillan and William Ash. McMillan was a driver for the Ideal Bread Company and was accustomed to drive on Annadale-road, where the accident happened. Upon the morning of the accident, the driver for the defendant company left his horse and bread-wagon standing on the top of a hill while he went in to serve customers. During his absence the horse shewed signs of moving on, and McMillan went over to the horse and took him by the head and held him until the driver returned. The driver got into the wagon and took the reins, and, according to McMillan's testimony, the wagon at that time was standing close to the north kerb and was in a safe position. As soon as the driver got in the bread-wagon, the horse, according to McMillan, skidded and ran down the hill on a gallop and collided with the truck upon which the plaintiff was standing. McMillan testified that the driver was doing all he could to stop the horse, but it seemed to be out of control, and the efforts made by the driver did not appear to have any effect on the horse in stopping him. He further stated that when he (McMillan) let go of the horse's head and the driver took the reins, the horse started to slide, and at that time the horse and wagon were a foot or two from the north kerb.

The witness William Ash testified that he was standing immediately opposite the horse and wagon while the driver was in a house serving customers, and that when the driver came out and took the reins and started to drive down the hill the horse started to slide and then went down the hill on a gallop. It appears from the evidence of both these witnesses that the horse was, at the moment the driver took command of the reins, on the north or right side of the road near the kerb, and that after it started to run away it crossed over to the left side, and thus brought about the collision with the truck upon which the plaintiff was standing.

It appeared in evidence that the pavement was a newly laid brick pavement, and from McMillan's evidence it also appeared that the horse, so far as McMillan knew, was making its first trip on that street.

Wright, J. Upon this testimony is there any evidence upon which a jury could reasonably find negligence on the part of the defendant company? I think not. The accident and resultant injuries to the plaintiff were clearly the result of the horse running away, and there is not a tittle of evidence to the effect that this horse was wild or vicious or had any tendency to run away prior to the accident in question, and therefore knowledge of any vice or wildness on the part of the horse cannot be imputed to the defendant company.

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Another branch of the case remains to be investigated, namely, was the action of the driver under the circumstances such as to establish negligence on his part? The uncontradicted evidence is that when he took the reins the horse was standing quietly and near the north kerb, and there is no evidence or any suggestion from any of the witnesses that the driver knew or saw any restlessness on the part of the horse when he was absent, or that such fact was communicated to him by McMillan, or by any other witness. There was therefore no ground for precaution or alarm on his part as to the actions of the horse in going down the hill. The uncontradicted evidence shews that immediately he took control of the horse and started down the hill it began to slide and run away, notwithstanding that he used every endeavour to regain and keep control of the horse's movements.

In my view, therefore, it could not be held that there was any evidence whatever of negligence on his part. The witness McMillan testified that in going down this hill, which apparently was somewhat steep, he kept close to the north kerb so that he could turn in to it in case his horse shewed any signs of running away, or became unmanageable. Here there was nothing to bring to the driver's notice that there was any probability whatever of the horse running away or becoming unmanageable. So far as the evidence shews, he did nothing but what any prudent driver would do, and the unfortunate accident to the plaintiff appears to have been one of those unavoidable accidents arising from no negligence on the part of any one.

The motion for a nonsuit will be granted.

I am of the opinion, although it is not necessary for me so to decide, that the jury's answer to the second question is entirely unsupported by the evidence and should be treated as a speculation or a theory on the part of the jury as to how the accident might have been avoided by the exercise of superabundant caution on the part of the driver, and not as a finding of fact as to what the driver using reasonable care should have done.

The action will therefore be dismissed, but without costs.

[APPELLATE DIVISION.]

VAMVAKIDIS v. KIRKOFF.

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April 26.
Dec. 6.

Marriage—Action for Declaration of Nullity—Absence of Consent and Fraud—Ceremony Taking place in Nova Scotia—Defendant Domiciled in Ontario—Jurisdiction of Supreme Court of Ontario to Declare an Alleged Marriage Void—Jurisdiction of English Ecclesiastical Courts not Conferred on Courts of Upper Canada.

The plaintiff, a girl of 16 years, went through a form of marriage with the defendant in Nova Scotia. She did not understand English or realise that a marriage ceremony was being performed. No consent had been granted by her father, and the defendant, knowing her age, misrepresented it as 20 in his application for a marriage licence. She had not cohabited with the defendant either before or after the ceremony. An action was brought in Ontario (where the defendant was domiciled) for a declaration that the marriage was null and void and of no effect:—

Held, upon the evidence, that the plaintiff did not consent to the marriage, that it was procured by fraud, and was therefore voidable at her election.

But *held*, that the Supreme Court of Ontario had no jurisdiction to entertain the action, and would have had none even if the marriage had been an Ontario marriage.

The jurisdiction of the Ecclesiastical Courts in England has not been conferred upon the Supreme Court of Ontario.

Lawless v. Chamberlain (1889), 18 O.R. 296, is no longer law.

Reid v. Aull (1914), 32 O.L.R. 68, approved.

Dictum of Lord Haldane in *Board v. Board*, [1919] A.C. 956, 963, discussed.

History of the jurisdiction of the Courts of Upper Canada and Ontario and the legislation pertaining thereto.

The Ontario Marriage Act, R.S.O. 1927, ch. 181, was not relied on or considered.

AN action brought by Marike Vamvakidis, an infant, suing by her next friend, William Merzanis, against Louis Chris Kirkoff and the Attorney-General for the Province of Ontario, for a declaration that a ceremony which purported to effect a marriage of the plaintiff to Kirkoff was null and void and of no effect.

The action was tried before LOGIE, J., without a jury, at a Toronto sittings.

R. G. McClelland, for the plaintiff.

The defendant Kirkoff was not represented.

W. B. Common, for the Attorney-General.

April 26. LOGIE, J.:—The plaintiff, a Greek, went through a form of marriage with the defendant, a Bulgarian, on the 12th February, 1927, at pier 2, in the city of Halifax, in the Province of Nova Scotia.

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She did not understand English or understand or realise that a marriage ceremony was being performed or that she was being married to the defendant Louis Chris Kirkoff. The defendant could not speak Greek, nor did the plaintiff understand the languages which the defendant did speak, in addition to English, namely Bulgarian and Turkish. The plaintiff believed that what was being done had only to do with the completion of the requirements necessary to her landing and entry into the Dominion of Canada. Prior to the said marriage taking place, no consent to the marriage had been granted by the plaintiff's father, Vasilis Vamvakidis, the person entitled to give such consent, as required by the Ontario Marriage Act, R.S.O. 1927, ch. 181, sec. 17, and by the Solemnization of Marriage Act, R.S.N.S. 1923, ch. 134, sec. 12, and amendments thereto. At the time the ceremony was performed, the plaintiff was of the age of 16 years, which fact was known to Louis Chris Kirkoff, who misrepresented her age as 20 in his application for a marriage licence. The plaintiff has not cohabited with the defendant Kirkoff either before or since the ceremony, and the said marriage was not consummated. The plaintiff alleges that a valid marriage was not effected, but that the form of marriage which she went through was null and void to all intents and purposes upon two grounds: first, that there was no consent on her part and the ceremony was obtained by the fraud of the defendant and should be declared invalid; and, secondly, that, the consent of the father not having been obtained, the Ontario Marriage Act, or that of Nova Scotia, renders it void *ab initio*.

I find that the plaintiff did not consent to the said marriage, which was procured by fraud, and is therefore voidable at her election; but since *Reid v. Aull* (1914), 32 O.L.R. 68, it is clear that this Court has no jurisdiction, on that ground, to annul a marriage *de facto*. The jurisdiction of the Court does not include the jurisdiction in this respect formerly possessed by the Ecclesiastical Courts in England. Nor has this Court jurisdiction to declare the marriage void *ab initio* under either the Ontario Act or the Nova Scotia Act. There is no statutory rule, other than the statute itself, in Ontario, giving jurisdiction to entertain a suit for the declaration of the nullity of any existing marriage. The Ontario Act deals with the solemnization of marriage and necessarily must be confined to marriages which were solemnized in Ontario. Any other construction of the Act would be bad, because the Province of Ontario would be thereby legislating as to the validity of a marriage in another Province. This is clearly *ultra vires* of the Province, nor can this Court, by considering the Nova Scotia statute, assuming it to have been proved, give the Ontario

Court jurisdiction under that statute. Assuming jurisdiction in the Court, the validity of the ceremony in a nullity action is to be determined according to the law of the place in which it was celebrated: *Niboyet v. Niboyet* (1878), 4 P.D. 1 (C.A.); and, so far as this case is concerned, by the Courts of that Province. In *Roberts v. Brennan*, [1902] P. 143, matrimonial residence within the jurisdiction was held sufficient to entitle the Court to pronounce a decree of nullity, but that case was undefended, and the propriety of the exercise of the jurisdiction in such a case was not argued.

There being no Divorce Court in Ontario, the plaintiff, who is clearly entitled to relief in some court, is in this unfortunate position. She cannot sue in Nova Scotia for a divorce, because the domicile of her husband is in Ontario, nor can she acquire another domicile in Nova Scotia and bring her action for divorce there: *Attorney-General for Alberta v. Cook* (1926), 42 Times L.R. 317. It is possible she might sue under the Nova Scotia Solemnization of Marriage Act, assuming that it is *intra vires*, for a declaration similar to the declaration she is asking in this Court; but, in my opinion, her best course is to go *in formâ pauperis* to the Parliament of Canada at Ottawa for the relief which she is clearly entitled to get.

Accordingly, I do not consider the constitutionality of our Marriage Act. This question will shortly be determined by the Appellate Division; but, whether our Marriage Act is valid or invalid, it can confer no jurisdiction upon an Ontario Court to declare a marriage in another Province either valid or invalid.

The plaintiff appealed from the judgment of LOGIE, J.

October 7. The appeal was heard by LATCHFORD, C.J., RIDDELL, MIDDLETON, MASTEN, and ORDE, J.J.A.

Lionel Davis and R. G. McClelland, for the appellant, argued that, it having been found by the learned trial Judge that the plaintiff did not understand the meaning or effect of the ceremony which was performed over herself and the defendant Kirkoff, the marriage was by the law of England voidable at the instance of the plaintiff, and that the law of England relating to the matters in question was the law of Ontario by reason of the statute of 32 Geo. III. ch. 1, sec. 1, now the Property and Civil Rights Act, R.S.O. 1927, ch. 130. By reason of the fact that the plaintiff was entitled to the relief claimed as a matter of substantive law, and no other remedy being provided by law, the Supreme Court of Ontario, being a superior court of record, had jurisdiction to

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App. Div. entertain the plaintiff's claim and to grant the relief claimed.
1929. Under the law of Nova Scotia the marriage would likewise be
VAMVAKIDIS void in the circumstances; and, the parties being now per-
v. manently resident in Ontario, the Supreme Court of Ontario had
KIRKOFF. jurisdiction to deal with the matter. The learned trial Judge
erred in finding that by reason of the decision in *Reid v. Aull*, 32
O.L.R. 68, the Supreme Court had no jurisdiction to entertain
the plaintiff's claim, because that decision has been overruled by
the judgment of the Privy Council in *Board v. Board*, [1919] A.C. 956.

No one appeared for the defendant Kirkoff.

W. B. Common, for the Attorney-General, was not called upon.

THE COURT, at the conclusion of the argument for the appellant, dismissed the appeal.

December 6. RIDDELL, J.A.:—This appeal from the judgment of Mr. Justice Logie we dismissed at the hearing, but we think it of such public importance that we should express our reasons for so doing.

For the purpose of this appeal I accept the findings of fact of the learned trial Judge, as set out in his judgment, *supra*.

The appeal was argued exhaustively and with great earnestness by learned counsel, who based most of their contentions upon the history of the law in this Province. That history is well known from official contemporary documents, statutes, and otherwise—and it may here be shortly stated.

On the cession of Canada by the Treaty of Paris, 1763, the greater part of what was to be the Province of Ontario was reserved for the Indians and the fur-trade, the territory east of a line from the south end of Lake Nipissing to about the present Cornwall being included in the "Government" or Province of Quebec, formed in 1763. The Royal Proclamation of the 7th October, 1763, expressly stated that "all Persons Inhabiting in or Resorting to" the Government of Quebec and certain other Provinces named "may confide in Our Royal Protection for the Enjoyment of the Benefit of the Laws of our Realm of England." Shortt and Doughty, *Documents relating to the Constitutional History of Canada, 1759-1791*, p. 165.

This Royal Proclamation—which, in this regard at least, proved a broken reed—substantially introduced the law of England, civil and criminal, into the Province of Quebec. When in 1774, by the "Quebec Act," 14 Geo. III. ch. 83 (Imp.), practically the whole of what is now the Province of Ontario was

made part of the Province of Quebec, the civil law was altered, and, speaking generally "in all matters of Controversy, relative to Property and Civil Rights, Resort" was to "be had to the Laws of Canada, as the Rule for the decision of the same." The criminal law remained unaltered, but in civil matters the former "Canadian" law—a law based upon the law of part of France, and ultimately upon the Civil Law of Rome—was reintroduced.

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By the Canada or Constitutional Act of 1791, 31 Geo. III. ch. 31 (Imp.), provision was made for the coming into active provincial life of two Provinces, Upper and Lower Canada, the former including, *de jure*, practically the present Province of Ontario. For reasons not here material, it included, *de facto*, much more. The Province of Upper Canada was launched in its separate Provincial existence by the Proclamation of General Alured Clarke, dated the 18th November, and becoming effective on the 26th December, 1791—the Province having been formed by Imperial Order in Council on the 24th August, 1791.

At the first session of the first Parliament of Upper Canada, which sat at Newark (Niagara-on-the-Lake), by the first Act, it was provided, sec. 3, that "in all matters of controversy relative to property and civil rights, resort shall be had to the Laws of England as the rule for the decision of the same:" (1792) 32 Geo. III. ch. 1, sec. 3 (U.C.) Accordingly the law, as well civil as criminal—this not being interfered with—governing the new Province was thereafter the law of England, modified, of course, by legislation by the Provincial Parliament. The Act of 1800, 40 Geo. III. ch. 1, sec. 1 (U.C.), provided: "That the Criminal Law of England, as it stood on the seventeenth day of September, in the year of our Lord one thousand seven hundred and ninety-two, shall be and the same is hereby declared to be the Criminal Law of this Province." The legislation now in force is the Property and Civil Rights Act, R.S.O. 1927, ch. 130: "In all matters of controversy, relative to property and civil rights, resort shall be had to the laws of England as they stood on the 15th day of October, 1792."

It is upon this legislation that Mr. Davis bases his argument that we can and should give his client the relief which she claims.

It was pointed out by Lord Haldane in *Walker v. Walker*, [1919] A.C. 947, at p. 950, in discussing whether the Court of King's Bench in Manitoba had jurisdiction to deal with a petition for a decree declaring a marriage null and void on the ground of impotency:—

"The answer to this question depends on what is the law

App. Div. relating to dissolution of marriage in the Province, and to the
1929. jurisdiction of its Court of King's Bench."

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In the consideration of the question before us, we must inquire into the question of the jurisdiction of the Court, and not simply consider what is the law in respect of the matter.

Riddell, J.A. Mr. Davis's argument substantially was that it was the law of Ontario and of Nova Scotia that a ceremony such as this not understood by the plaintiff was *ipso facto* void; and he argued that, consequently, the Court must have jurisdiction. I do not think that such a marriage is *ipso facto* void; for example, if the woman were to go and live with the man as his wife, I see nothing to charge her with immorality; and, if he should die possessed of real estate, she surely would be entitled to dower in it. But I assume that the plaintiff can claim that she is not the defendant's wife; this does not conclude the question. In addition to the law, we are to consider the jurisdiction of the Court.

In that again, Mr. Davis appeals to history; but I am unable to see how he is assisted. The former Courts of Common Pleas, erected in 1788 by Lord Dorchester (Sir Guy Carleton) in this territory, with full civil jurisdiction, came to an end in 1794, when a Court of King's Bench was erected in Upper Canada having full Common Law jurisdiction, civil and criminal. This Court was a court of record of original jurisdiction and possessed all such powers and authorities as by the law of England were incident to a superior court of civil and criminal jurisdiction, and had the jurisdiction of the English Courts of King's Bench, Common Pleas, and, in matters regarding the King's revenue, of the Court of Exchequer, in England: (1794) 34 Geo. III. ch. 2 (U.C.) It had no Equity jurisdiction; and no Court of Equity appeared till 1837. The Court of Chancery erected in 1837 by the Act 7 Wm. IV. ch. 2 (U.C.) was reconstituted in 1849 by the Act 12 Vict. ch. 64 (Can.); and, in the same year, a new Common Law Court called the Court of Common Pleas was created with the same jurisdiction as the Court of Queen's Bench.

These Courts continued side by side, till the Judicature Act of 1881, 44 Vict. ch. 5 (Ont.), when they were consolidated. The new Court has continued, with an occasional change of name, till the present time.

This Court is "a Superior Court of Record," having "all the jurisdiction, power and authority which on the 31st day of December, 1912, was vested in or might be exercised by the Court of Appeal or by the High Court of Justice or by a Divisional Court of that Court:" R.S.O. 1927, ch. 88, sec. 2. The date has reference to the amendments introduced into the Judicature Act

by the Act (1912) 2 Geo. V. ch. 17 (Ont.); the jurisdiction is set out in the Act R.S.O. 1897, ch. 51, sec. 25, namely:—

“All such powers and authorities as, by the law of England, are incident to a Superior Court of civil and criminal jurisdiction; and shall have, use and exercise all the rights, incidents and privileges of a Court of Record, and all other rights, incidents and privileges as fully to all intents and purposes as the same were on the 5th day of December, 1859, used, exercised and enjoyed by any of Her Majesty’s Superior Courts of Common Law at Westminster in England, and may and shall hold plea in all and all manner of actions.”

And by sec. 26 the Court is given its Equity jurisdiction, namely:—

“The like jurisdiction and powers as by the laws of England were on the 4th day of March, 1837, possessed by the Court of Chancery in England, in respect of the matters hereinafter enumerated, that is to say:”

The enumerated cases have no relation to any case like the present. It cannot be contended that “Her Majesty’s Superior Courts of Common Law at Westminster” had any jurisdiction “on the 5th day of December, 1859,” to deal with such a case as this. It is true that jurisdiction in somewhat similar cases—perhaps in an identical case—was given in 1857 in England to a Court, but that was a Court specially erected for the purpose, “The Court for Divorce and Matrimonial Causes” (1857), 20 & 21 Vict. ch. 85, sec. 6 (Imp.)

There is then no statutory authority for this Court to entertain this action. Even assuming that the Court could entertain such an action were the marriage an Ontario marriage, which I do not assert, it could not do so in the case of one in Nova Scotia.

Much of the argument of Mr. Davis was based upon a statement by Lord Haldane in *Board v. Board*, [1919] A.C. at p. 963: “It is the rule as regards presumption of jurisdiction . . . that, as stated by Willes, J., in *London Corporation v. Cox* (1867), L.R. 2 H.L. 239, 259, nothing shall be intended to be out of the jurisdiction of a superior Court but that which specially appears to be so.” This statement of Willes, J., is based upon the old case of *Peacock v. Bell* (1667), 1 Wms. Saund. 69, 73, which is also cited in *Scott v. Bennett* (1871), L.R. 5 H.L. 234, 248; *Byrne v. Guano Consignment Co.* (1872), 25 L.T.R. 935; *Cooke v. Gill* (1873), L.R. 8 C.P. 107, 114; *Oulton v. Radcliffe* (1874), L.R. 9 C.P. 189, 194—the different reports giving different paging in Wms. Saund., I have taken the paging of the 5th edition (1824)—the paging given being 69, 74a, 74b, 90n (3) and 96. The

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App. Div. case is also cited in Broom's Legal Maxims, pp. 114, 616, of the
1929. 9th edition (1924), as illustrative of the maxims "*De non
apparentibus et non existentibus eadem est ratio*" and "*Omnia
præsumuntur rite solenniter esse acta;*" and the whole gist of
VAMVAKIDIS v.
KIRKOFF. the decision is the "well known distinction . . . that, when
Riddell, J.A. parties claim or justify under a Court of inferior rank or limited
power, the circumstances giving the jurisdiction must be shewn,
but not where the authority is derived from a superior Court:"
Gosset v. Howard (1847), 10 Q.B. 411, at p. 421.

Neither *Peacock v. Bell* nor any of the cases in which it is cited lends the slightest colour to a contention that, there being a cause of action admitted, unless the jurisdiction of a Superior Court is expressly shewn, it must have jurisdiction. No one has heretofore argued that the Court of Chancery in England or Upper Canada could try an action for assault and battery or seduction; nor has any one so far suggested that the Court of Queen's Bench or Common Pleas in either country could try a claim for specific performance or alimony—and yet they were Superior Courts and there was no specific prohibition against them exercising such jurisdiction. Nor does it follow that, because a person has a right under the law, the Superior Court must entertain an action to declare his right. The maxim *Ubi jus ibi
remedium* applies rather in the reverse, laying it down that what is claimed cannot be called *jus*, unless the law has provided some remedy.

No one would contend that, before the institution of the Court of Chancery in Upper Canada, a purchaser of land could enforce specific performance or that (except as provided by statute of 1734, 7 Geo. II. ch. 20 (Imp.)) a mortgagor could redeem. Of course, although neither the Court of Chancery nor the Common Law Courts had jurisdiction in matters of marriage, either might be called upon to decide whether an alleged marriage had taken place, or if, having taken place, it was valid. In the Common Law Court, the plaintiff in an action for ejectment might be called upon to establish the marriage of his parents—the plaintiff in an action of criminal conversation might—and, if non-marriage was pleaded, would—be called upon to establish the legal relationship of husband and wife: *Campbell v. Carr* (1843), 6 O.S. 482; *Ford v. Langlois* (1866), 19 U.C.R. 312. So the Court of Chancery might be required to determine the effect of a ceremony—or the actual existence of a ceremony—in a suit for alimony.

But no authority ever existed in any Upper Canadian or Ontario Court to entertain an action for a declaration that an alleged marriage was null.

I am not prejudging the matter now before the Court as to the validity of R.S.O. 1927, ch. 181, sec. 17 *et al.*; that refers to marriages within Ontario only.

The very high authority of the late Chancellor, Sir John Boyd (*nomen honoratissimum*), has been appealed to; it is true that that very learned Judge, in *Lawless v. Chamberlain*, asserted the authority of the Court to declare a marriage valid in form, without validity in law—and in an action brought for the purpose, reported in (1889) 18 O.R. 296, so declared. This decision has been considered in *Reid v. Aull*, 32 O.L.R. 68, and in *Weinbrom v. Weinbrom* (1922), 23 O.W.N. 458, and by what seems to me unanswerable logic held not to be law. We decline to follow it.

I can see no reason for the conclusion that this Court has any jurisdiction in the present case; and would dismiss the appeal with costs, not interfering with the disposition of the costs in the Court below.

MIDDLETON, J.A.:—I considered with great care the question of the jurisdiction of this Court in matrimonial causes in *Reid v. Aull*, 32 O.L.R. 68, and it then seemed plain to me that at critical dates when our Courts were given jurisdiction similar to that possessed by certain English Courts these English Courts had no jurisdiction over matrimonial causes. The Court of Chancery was given jurisdiction in alimony, but save as to this the ecclesiastical jurisdiction possessed by certain English Courts has never been given to any Ontario Court.

The cases in the Privy Council which determine that in the Western Provinces the Courts have divorce jurisdiction are not in point. The jurisdiction of certain English Courts at a much later date was conferred upon the Provincial Courts, and at this later date, by English legislation, these English Courts had been given jurisdiction in divorce and matrimonial causes.

The action was rightly dismissed for lack of jurisdiction.

MASTEN, J.A.:—Appeal from the judgment of Logie, J., dismissing an action for a declaration of nullity of marriage, on the ground of want of jurisdiction in the Court. I concurred in the conclusion announced by the Court on the conclusion of the argument for the appellant, but, because the question of the jurisdiction of the Supreme Court, as raised by counsel for the appellant, seems to me to be of general importance, I desire to express my view of what, in my opinion, is the fundamental heresy of the appellant's argument.

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App. Div. The facts and circumstances giving rise to this action are
1929. adequately stated in the judgments of Logie, J., and of my brother
 Riddell, and I need not here repeat them. The first step which
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 Masten, J.A. that the Supreme Court of Judicature for Ontario must entertain
 jurisdiction of an action to declare nullity of marriage even though
 the marriage took place in Nova Scotia. His argument was that
 the substantive law of England, as introduced into Upper Canada
 by its Legislature in 1792, included the ecclesiastical law at that
 time in force in England pursuant to which the Ecclesiastical
 Courts granted decrees of nullity of marriage.

Counsel then contended that, assuming such substantive law
 to be in force in this Province, it follows as a consequence that
 the Supreme Court of Judicature for Ontario, being a superior
 court of record, must necessarily be taken to have jurisdiction to
 enforce such substantive law pursuant to the maxim *ubi jus ibi
 remedium.*

In opening his appeal counsel stated that he relied solely on
 the ground above stated and did not rely in any way on the
 Ontario Marriage Act, R.S.O. 1927, ch. 181. Consequently the
 following observations are to be understood as relating only to
 the question of jurisdiction so raised by counsel, and do not touch
 on the validity or scope of the Ontario Marriage Act nor on the
 question as to whether the Upper Canada Act of 1792 incorporated
 as part of the substantive law of the Province the ecclesiastical
 law of England as it stood in 1792. On both of these questions I
 desire to reserve my opinion.

The distinction between a right and a remedy is well illustrated by the oft-quoted passage from the judgment of Holt, C.J., in *Ashby v. White* (1703), 1 Sm. L.C., 13th ed., 253, at p. 273:—

“If the plaintiff has a right, he must of necessity have a means to vindicate and maintain it, and a remedy if he is injured in the exercise or enjoyment of it; and indeed it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. As if a purchaser of an advowson in fee-simple, before any presentment, suffer an usurpation, and six months to pass, without bringing his *quare impedit*, he has lost his right to the advowson, because he has lost his *quare impedit*, which was his only remedy; for he could not maintain a writ of right of advowson; and though he afterwards usurp and die, and the advowson descend to his heir; yet the heir cannot be remitted, but the advowson is lost for ever without recovery, 6 Co. 50.”

Not only is the right to be distinguished from the remedy but the substantive law is one thing and the jurisdiction to administer

it and give a remedy is quite another. For example, the Dominion Parliament might, under its exclusive jurisdiction relative to marriage and divorce, enact a divorce law giving to spouses rights theretofore unknown in Ontario; but a court to administer such divorce law could, under sec. 92 of the British North America Act, be provided only by the Legislature of Ontario; and, as a right becomes nothing without a remedy, so there can be no remedy without a court with jurisdiction to provide it.

To an Ontario lawyer the proposition of the appellant's counsel (embodying an absolute reversal of the doctrine that has been the law of the Province as understood both by the courts and the Legislature ever since 1792) is, to say the least, startling.

The history of the jurisdiction of the Courts both in England and in Upper Canada and Ontario shews that such jurisdiction has from time immemorial been assumed to originate in a specific grant emanating in the earliest times directly from the King, but always in later times by an Act of Parliament, and never by implication.

In English law the jurisdiction in respect of nullity of marriage and jactitation of marriage seems at all times to have been regarded as a distinct and separate branch of the jurisdiction; and, in accordance with the constitutional rule as hitherto understood, the establishment of courts to exercise that jurisdiction and the transfer of that jurisdiction from one court to another has always been effected in England by a statute enacted by Parliament.

Before 1857, the jurisdiction under consideration was exercised by the Ecclesiastical Courts; but in that year Parliament passed the Act known as the Divorce and Matrimonial Causes Act, 20 & 21 Vict. ch. 85, whereby the Court of Divorce and Matrimonial Causes was constituted as a court of record and was given exclusive jurisdiction in all causes, suits, and matters matrimonial in England except marriage licences.

By sec. 22 of the Judicature Act, 1873, 36 & 37 Vict. ch. 66 (Imp.), this jurisdiction was expressly transferred to the High Court is now exercisable by the Judges of that court.

Similarly, in Upper Canada and in the Province of Ontario the jurisdiction of the Courts has in like manner been created, conferr-ed and transferred only by legislative enactment; and no other source of jurisdiction has, so far as I can discover, ever been recognised or attempted.

My brother Riddell has traced the history of the several courts which have from time to time existed in Upper Canada and in Ontario. Without repeating what he has said, I refer to this his-

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App. Div. tory in order to point out the fact that in 1794 the Crown, by
1929. and with the advice of the Legislature of Upper Canada, granted
 VAMVAKIDIS to the Courts of Queen's Bench and Common Pleas a certain
v. specific jurisdiction, and in 1837 to the Court of Chancery another
 KIRKOFF. specific jurisdiction; and that, when at a later date these powers
 Masten, J.A. and authorities were transferred to and vested in the Supreme
 Court of Judicature, that transfer was made by the express words
 of a statute. The same remark applies to the creation of the
 Surrogate, County, and Division Courts presently in existence
 and to the determination in each case of the jurisdiction of such
 courts.

If the true doctrine is as suggested by counsel for the appellant, then in Upper Canada the Court of King's Bench and the Court of Common Pleas possessed all the equity jurisdiction of the English Court of Chancery from the time when they were established, and the Chancery Act of 1837 was a superfluity, or, to put it more generally, all that Parliament need ever do is to pass a substantive law, and thereupon every superior court of record acquires jurisdiction to enforce it, and all the Imperial Acts as well as the Ontario Acts establishing different courts and conferring and defining their several jurisdictions were futile and utterly unnecessary. All that would be necessary would be to appoint Judges of a superior court of record, and thereupon full jurisdiction would inhere in them to administer the whole substantive law of the land.

The fact that the Ontario doctrine of the jurisdiction of our Courts has been understood in a certain way for more than 130 years may not be adequate to establish it, but it is at least sufficient to lead one to examine carefully into the authorities in order to see whether it is not well-founded, and accordingly I make some brief references to the old authorities:—

In *John Russel Co. Ltd. v. Cayzer Irvine & Co. Ltd.*, [1916] 2 A.C. 298, Lord Haldane says (p. 302):—

"The root principle of the English law about jurisdiction is that the judges stand in the place of the Sovereign in whose name they administer justice."

To the same effect is the statement of Mr. Justice Willes in the case of *London Corporation v. Cox*, L.R. 2 H.L. at p. 254, and of Wilmot, C.J., in *Rex v. Almon* (1765) 243.

See also Bacon's Abr., tit. "Prerogative" D. 1.

In Chitty on Prerogatives of the Crown, at p. 76, it is said:—

"The courts of justice . . . though they were originally instituted by royal power, and can only derive their foundation from the Crown, have, respectively, gained a known and stated

jurisdiction, and their decisions must be regulated by the certain and established rules of law. It necessarily follows, that even our Kings themselves cannot, without the express sanction of an Act of Parliament, grant any addition of jurisdiction to such courts; as, for instance, that the Court of King's Bench may determine a mere real action; nor authorise any one to hold them in a manner dissimilar to that established either by the common or statute law of the land."

And this statement is supported by the decision of the Judicial Committee of the Privy Council in *In re Bishop of Natal* (1864), 3 Moore P.C.N.S. 115, at p. 152, where it is said:—

"It is a settled constitutional principle or rule of law, that although the Crown may by its prerogative establish Courts to proceed according to the common law, yet that it cannot create any new court to administer any other law; and it is laid down by Lord Coke in the 4th Institute, that the erection of a new court with a new jurisdiction cannot be without an Act of Parliament."

See also *Attorney-General v. Sillem* (1864), 10 H.L. C. 704, at p. 720.

These authorities appear to me to support the legislative practice which has hitherto prevailed and to negative the possibility of a new jurisdiction without express grant and by mere implication.

But the appellant contends that the principle in question has been reversed by a passage in the judgment of Viscount Haldane in *Board v. Board*, [1919] A.C. at p. 962. In that case the jurisdiction of the Courts of Alberta to entertain a petition for divorce was questioned on a motion to quash the proceeding for lack of jurisdiction. The Courts of Alberta maintained the jurisdiction, and their judgment was confirmed in the Privy Council. Some of the phrases used by the learned Viscount, if read without reference to their context in the whole judgment, might be taken as laying down the broad rule or principle that, as the law of divorce as it existed in England under the Act of 1857 was imported into Alberta, the superior courts of record of Alberta, *ipso facto* and without any express statute conferring jurisdiction on them, must be taken to possess jurisdiction to administer that law. So startling a conclusion has led me to read and consider with care the judgments in all the cases relating to the divorce jurisdiction in British Columbia, Alberta, and Manitoba, including *S. v. S.* (1877), 1 B.C.R. 25; *Scott v. Scott* (1891), 4 B.C.R. 316; *Sheppard v. Sheppard* (1908), 13 B.C.R. 486; *Watts v. Watts*, [1908] A.C. 573; *Walker v. Walker* (1918), 28 Man. 495, [1919]

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App. Div. A.C. 947; and *Board v. Board* (1918), 13 Alta. L.R. 362, [1919] 1929. A.C. 956.

VAMVAKIDIS v. KIRKOFF. I find that in every case the Court discovered express legislation adequate to confer on the Courts of the Provinces respectively jurisdiction to administer that law. See, for example, pp. Masten, J.A. 954 and 955 of [1919] A.C., in the report of *Walker v. Walker*, cited above.

In *Board v. Board* the Court first finds that the effect of the Dominion Act of 1886 was to make the English law of divorce, as established by the Matrimonial Causes Act of 1857, apply to the Territories as well as to Alberta, and the judgment then proceeds as follows (pp. 958, 959) :—

"But there is another question which has been raised in this appeal, which is whether the Supreme Court of the Province of Alberta has been so constituted as to have jurisdiction in matrimonial causes, including divorce."

And Lord Haldane then proceeds to consider and discuss the various statutory enactments relating to that subject, viz., the Dominion Act of 1886, 49 Vict. ch. 25; the Supreme Court of Alberta Act, 7 Edw. VII. ch. 3; the provisions of the English Divorce Laws, 1857 and 1859, conferring on all the Judges of the English Common Law Courts jurisdiction in Divorce, and at p. 962 he records the conclusion of the Judicial Committee in the following words :—

"Their Lordships think that the way in which the Act of 1857, as it stood originally unaltered by subsequent legislation such as the Judicature Acts, constituted the existing judges of other Courts judges of the new Court, detracts from the weight of any inference based on the omission of a reference to it in the Acts settling up the Supreme Courts of the North-West Territories and of Alberta. Had it been intended to exclude jurisdiction in divorce it would have been necessary to say so; for the language of sec. 9 of the Act of 1907 in particular is so comprehensive that it confers on the Supreme Court of Alberta *all the capacity given by the Divorce Acts to the judges of the other Courts in England to act as the Court established by those Acts.* Their Lordships would arrive at this conclusion even if the words 'at the commencement of this Act' in sec. 9 of the Act of 1907 were treated as rendered nugatory by the changes effected by the English Judicature Act."

If the Judicial Committee had intended to lay down the broad rule that the existence of a substantive law of divorce carried with it jurisdiction to the Superior Courts to enforce it, that would have been so stated, and there was no reason for an inquiry into

the legislation conferring jurisdiction. The purpose, as I take it, of the concluding passage of the judgment (pp. 962 and 963) is to support the conclusion already reached in the passage above quoted, by reference to the rule that if there is any doubt that doubt must be resolved in favour of the jurisdiction of a superior court of record, which is very different from saying that jurisdiction in the Court arises by necessary implication from the existence of substantive law.

I therefore conclude that our law has not been altered by *Board v. Board*, and that, certain specific jurisdiction in our various courts having been established (by statute) from time to time, the maxim to be applied is *expressio unius exclusio alterius* and not *ubi jus ubi remedium*, and that the jurisdiction in question, that is the jurisdiction exercised by the Ecclesiastical Courts of England in 1792, could not have been introduced into Upper Canada except by legislation, that is, by the Crown, acting by and with the advice and consent of the Legislature of the Province, expressly conferring such jurisdiction on the Courts of Upper Canada.

There remains only the question whether the provisions of the Ontario Judicature Act confer on the Supreme Court of Ontario the jurisdiction now under consideration. For the reasons stated by my brother Middleton in *Reid v. Aull*, 32 O.L.R. 68, which I fully adopt, as well as for the reasons of my brother Riddell in this present case, I am of opinion that the Judicature Act confers no such jurisdiction on this Court, and I cannot usefully add to what my brethren have said.

It might have been sufficient to say that on this question of jurisdiction we are bound by the decision of the Divisional Court in *Ranger v. Ranger* (1920), which is reported only in 18 O.W.N. 66. In that case the judgment of the Divisional Court was delivered by the present Chief Justice of Ontario. The action was by a supposed second wife for a declaration of nullity in the case of a marriage alleged by her to be bigamous. The action was dismissed in the absence of the plaintiff and his counsel. An application was made to Middleton, J., to vacate the judgment but he refused to do so. An appeal was taken against his order, and in the course of his judgment the learned Chief Justice said that:—

"If the plaintiff had no cause of action, no useful purpose would be served by sending the case back for trial; and, therefore, it was proper for the Court to determine whether or not the Court had jurisdiction to grant the relief asked. The Marriage Act, R.S.O. 1914, ch. 148, secs. 36 and 37, and amendments, purport

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*VAMVAKIDIS**v.**KIRKOFF.*

Masten, J.A.

App. Div. to confer jurisdiction on the Supreme Court of Ontario to declare
1929. certain marriages invalid. Only so far as thus empowered has
VAMVAKIDIS the Court jurisdiction to declare a marriage invalid. Even if
v. the Legislature has power to do so, it has not seen fit to give or
KIRKOFF. purport to give to the Court jurisdiction to declare a bigamous
Masten, J.A. marriage invalid. Therefore, the Court is powerless to grant the
 relief asked."

However, out of respect for the elaborate argument presented by the appellant's counsel, I have thought it not unwarrantable to discuss at large the question raised.

LATCHFORD, C. J., agreed with MASTEN, J.A.

ORDE, J.A., agreed in the result.

Appeal dismissed.

[APPELLATE DIVISION.]

1929.

MEAGHER v. LONDON LOAN AND SAVINGS CO. OF CANADA.

Dec. 6.

Interest—Mortgage—Bonus—Unusual Form of Transaction—Interest Act, R.S.C. 1927, ch. 102, secs. 6, 7, 8, 9—Action for Money Had and Received.

The judgment of WRIGHT, J., *ante* 221, was affirmed on appeal. Review of the authorities.

AN appeal by the defendant company from the judgment of WRIGHT, J., *ante* 221.

October 10. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

W. N. Tilley, K.C., and Hamilton Cassels, for the appellant company, argued that payment of the bonus in question was not a violation of the provisions of the Interest Act, R.S.C. 1927, ch. 102. The agreement of Trans-Canada Theatres Ltd. to pay the bonus was distinct from and formed no part of its liability under the mortgage, and the bonus was not interest for the use of money, but the consideration, under a separate agreement, paid once for all to the appellant company for its risk in entering into the lending contract. In this respect the case at bar differs from *Singer v. Goldhar* (1924), 55 O.L.R. 267, and like cases. A mortgagor may bargain not to assert the right given him by the

Act: Falconbridge on Mortgages, p. 45; article in 5 Canadian Bar Review, p. 161. Note a Saskatchewan case referred to at p. 166, *Cummings v. Silverwood*, [1918] 3 W.W.R. 629, 11 Sask. L.R. 407. The bonus was reasonable in amount, and was paid voluntarily by Trans-Canada Theatres Ltd. to the appellant, with full knowledge of its rights, and Trans-Canada Theatres Ltd. was not, nor is the plaintiff as its liquidator, entitled to repayment. On the question of the difference between bonus and interest, counsel referred to *Ex p. Bath* (1884), 27 Ch. D. 509. There was no blending of principal and interest in the case at bar: *Cummings v. Silverwood, supra*.

R. V. Sinclair, K.C., for the plaintiff, respondent. The action was brought under the provisions of secs. 6 and 9 of the Interest Act, R.S.C. 1927, ch. 102, on the ground that the mortgage does not contain a statement shewing the amount of principal money and the rate of interest chargeable thereon calculated yearly or half-yearly, in advance. The repayment of the bonus was also sought upon the ground that the liquidator, being unaware of the payment of the bonus in question, the full amount claimed by the appellant company, including the bonus of \$3,000, was paid under mistake of fact, and in the belief that the appellant was entitled to receive the full amount claimed, and so was money had and received by the appellant to the use of the respondent. On the question of the right to recover the bonus on the ground that it must be considered as a payment of interest, reference was made to *Singer v. Goldhar*, 55 O.L.R. 267; *Lastar v. Poucher* (1926), 58 O.L.R. 589; *Prousky v. Adelberg* (1926), 59 O.L.R. 71; *Re Brown* (1928), 61 O.L.R. 602; *Rogers v. Labow* (1929), *ante* 309. As to the defence of the Limitations Act, the bonus claimed was a sum of money recoverable under the terms of the Interest Act, and the period of limitation in respect of moneys payable under a statute is 20 years: see R.S.O. 1927, ch. 106, sec. 48 (b); *Cork and Bandon Railway Co. v. Goode* (1853), 13 C.B. 826; *Carlyle v. County of Oxford* (1914), 30 O.L.R. 413. On the point that money paid by mistake of fact can be recovered back, counsel relied upon *In re Bodega Co. Ltd.*, [1904] 1 Ch. 276; *Perry & Perry v. Newcastle District Mutual Fire Insurance Co.* (1852), 8 U.C.R. 363; *Imperial Bank of Canada v. Bank of Hamilton*, [1903] A.C. 49. The bonus was not paid for the risk of lending; it was paid for the use of the money lent, that is, for interest. A mortgagee always takes a risk.

December 6. *MASTEN, J. A.*—Appeal from the judgment of *Wright, J.*, dated the 30th May, 1929, whereby it was adjudged

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App. Div. that the plaintiff recover from the defendant company the sum of
1929. \$4,436.31 and costs.

MEAGHER v. The facts are stated in the reasons for judgment of Wright, J.,
LONDON LOAN AND SAVINGS CO. OF CANADA. *ante* 221.

Masten, J.A. The present action is, in substance, and perhaps also in form, an action for money had and received by the appellant company to the use of the respondent, being money which the respondent alleges was not due or payable to the appellant company, but which was paid to it voluntarily, without consideration, under mistake of fact on or about the 12th March, 1925.

The plaintiff now brings this action to recover the amount of the bonus and interest thereon, claiming that he is entitled to the relief provided for by sec. 9 of the Interest Act, R.S.C. 1927, ch. 102.

While the transaction in 1922 was in form an advance by the appellant company of \$30,000 and payment of a bonus by the respondent of \$3,000, yet it was obviously one single transaction, in which the actual advance by the appellant company was \$27,000. This fact is made quite plain by the correspondence. On the 18th March, 1922, the respondent wrote to the appellant company as follows:—

“Montreal, 502-4 Transportation Building,
 “March 18th, 1922.

“M. J. Kent, Esq., Manager,
 “London Loan and Savings Co. of Canada,
 “220 Dundas St., London, Ontario.

“Dear Sir: With reference to the sum of \$30,000 which you are loaning us on mortgage on our Grand Opera House property, London, Ontario, we hereby authorise you to deduct from said loan amount, the sum of \$3,000 bonus due you, and also your solicitors' fees in connection with this loan. Yours truly,

“S. W. Hicks, Secretary-Treasurer.”

To which the appellant company replied by letter dated the 31st March, which in part reads as follows:—

“Dear Sirs: *Re Trans-Canada Theatres Ltd. and London Loan—*

Your file No. 2672.

“We beg to acknowledge receipt of your letter of the 29th inst. enclosing mortgage, resolution, and declaration, as therein stated, and your letter of March 30th.

“It has been the custom of our clients to take back a cheque for the amount of the bonus rather than to deduct the amount from the loan. They prefer not to make an exception of this case; but we will undertake to hold the cheque in escrow until

cheque for the amount of the loan, less costs, has been forwarded to you."

In my opinion, we must decline to treat the agreement respecting the \$3,000 bonus as an antecedent, collateral, and independent contract. Consequently, the amount of the actual advance by the appellant company for which the mortgage was security is \$27,000, not \$30,000, and in the payment made by the respondent to the appellant company of \$39,610.30, there were included, first, the principal sum of \$27,000 actually advanced, second, a bonus of \$3,000, and, third, interest at $7\frac{1}{2}$ per cent. on \$30,000, also certain other items not pertinent to the question now under consideration.

The mortgage on its face appears to be a straight mortgage for \$30,000 with interest at $7\frac{1}{2}$ per cent., and the respondent, when he paid off the mortgage in 1925, was in entire ignorance of the fact that \$3,000 out of the \$30,000 was a bonus. If then this bonus and the interest on it was not, under the statute, recoverable by the appellant company, then the payment was made under a mistake of fact, and is recoverable as money had and received, or in the alternative under sec. 9 of the Interest Act.

The decisions of the Appellate Division of the Supreme Court of Ontario (which we are bound by statute to follow) appear to establish:—

(1) That if, in addition to the principal money actually advanced, any further sum is repayable by the mortgagor, whether such sum is designated by the parties as interest, or as bonus, or as commission, such sum is interest within the meaning of the Interest Act, R.S.C. 1927, ch. 102, secs. 6, 7, 8, and 9: *Singer v. Goldhar*, 55 O.L.R. 267; *Re Brown*, 61 O.L.R. 602. *Ex p. Bath*, 27 Ch. D. 509, indicating the distinction which obtains in the Courts of England between bonus and interest, was cited by counsel in the *Brown* case but was not followed.

(2) If the mortgage stipulates for any lump payment in addition to the principal, such provision falls within the purview of that part of sec. 6 of the Interest Act which provides that the section shall apply where the mortgage is payable "on any plan which involves an allowance of interest on stipulated repayments:" *Re Brown*, 61 O.L.R. at p. 608, followed in *Rogers v. Labow*, ante 309. For example, in the present case, while the principal actually secured by the mortgage was \$27,000, the final repayment stipulated for was \$30,000, thus blending the \$27,000 of principal and the \$3,000 of bonus or interest in one payment.

It was held otherwise by the Courts in Saskatchewan in the case of *Cummings v. Silverwood*, 11 Sask. L.R. at p. 410; but

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in the cases of *Laster v. Poucher*, 58 O.L.R. 589, *Prousky v. Adelberg*, 59 O.L.R. 71, and *Re Brown*, 61 O.L.R. 602, 608, a different view has been adopted and it has been held that such a stipulation in the mortgage brings it within the ambit and purview of sec. 6.

If I have correctly stated the principles or rules established by the decisions above quoted, then the mortgage in question must, in order to have complied with the Interest Act, have contained a statement shewing the amount of the principal money (\$27,000) and the rate of interest payable by the mortgagor on \$27,000, treating the \$3,000 payment as a payment of interest.

As the mortgage contained no such statement, the penalty prescribed by sec. 6 applies, subject to the modification provided by sec. 7.

No argument was addressed to us with regard to the amount of the judgment, and I assume that it is correct, and that, in the view which I have taken, the sum mentioned in the judgment was not payable to the appellant company in 1925, and is now recoverable as money had and received by the appellant company in accordance with sec. 9 of the Interest Act.

I desire to add one further observation before parting with the case. It is entirely possible that the decisions in this Court have carried the application of the Interest Act beyond what was in contemplation of the Legislature in passing it. I am entirely in accord with the statement of the purpose of the Act which was made by Mr. Justice Walsh in *Canadian Mortgage and Investment Co. v. Cameron* (1917), 11 Alta. L.R. 441, 33 D.L.R. 792, where he says (p. 794):—

“The evil which this section aims to prevent is the imposition of an extortionate rate of interest through the medium of blended payments of principal and interest. Under this system, without the protection which this section affords, a highly usurious rate of interest might be wrapped up in these innocent-appearing blended payments without the slightest suspicion on the part of an ignorant or careless borrower that he was being made the victim of it.”

But the Court is bound to administer the law according to the language of the statute, and in my view the language of the statute has been correctly interpreted by the Ontario cases to which I have referred. I took occasion in the case of *Rogers v. Labow* to point out that the result might be unfair to the mortgagee; but, if such results are to be avoided, the remedy must be provided by Parliament and cannot be effected by the Courts.

I would dismiss the appeal with costs.

LATCHFORD, C.J.:—I agree.

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RIDDELL, J.A.:—I agree in this judgment, as I conceive we are concluded by authority by which we are bound.

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ORDE and FISHER, JJ.A., also agreed.

Appeal dismissed.

Latchford,
C.J.

[APPELLATE DIVISION.]

REX v. WILMOT.

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Dec. 6.

Criminal Law—Causing Bodily Harm by Wanton or Furious Driving of Motor-vehicle—Criminal Code, sec. 285—Evidence of Excessive Speed—Absence of Causal Connection with Disaster—Mens Rea.

The defendant was convicted of an offence against sec. 285 of the Criminal Code, for that he did, having the charge of an automobile, by wanton or furious driving or other wilful misconduct or by wilful neglect, cause bodily harm to N. H. There was evidence that the defendant's automobile was being driven by him upon a good country road at a speed of 50 miles an hour, and also evidence that the speed did not exceed 35 miles an hour, and that the cause of the vehicle running into a ditch and thereby injuring N. H., who died from her injuries, was "shimmying," which disabled the defendant from perfect control:—

Held, upon appeal, quashing the conviction, that there was an absence of conclusive evidence that the defendant was driving furiously or was guilty of wilful misconduct or neglect, and he was entitled to the benefit of the doubt.

Per RIDDELL, J.A.:—Even if it were proved that the speed was excessive, the casualty was not caused by the speed, and sec. 285 was not applicable.

Sembler, there must be something of *mens rea* to bring the driving within the section.

AN appeal by the defendant from his conviction by the Judge of the County Court of the County of Oxford, in his Criminal Court, for driving an automobile wantonly, furiously, and negligently upon a highway, and thereby causing bodily harm to one Nancy Hay, contrary to sec. 285 of the Criminal Code.

October 23. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

T. N. Phelan, K.C., for the appellant, argued that the cause of the accident was neither excessive speed nor wanton misconduct, but rather that the injury complained of was the result of unavoidable accident. The accident was caused by the car "shim-

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mying," which made it swerve from side to side and get out of control. The appellant had done everything possible to remedy this condition, but the accident happened before the car could be righted.

A. W. Rogers and W. J. A. Fair, for the Crown, contended that the evidence amply supported the finding of excessive speed, which was such as to amount to wanton and furious driving, and was the cause of the accident. There was not sufficient evidence to shew that "shimmying" was the cause of the car getting out of control; the cause was the driving at 50 miles an hour on a country road which had ruts in it, and so threw the car out of control and into the ditch.

December 6. RIDDELL, J.A.:—This is an appeal from a conviction by his Honour Judge Wallace in the County Court Judge's Criminal Court of the County of Oxford.

Wilmot was charged with an offence under sec. 285 of the Criminal Code, "for that he the said Gerald M. Wilmot, on the eighth day of June in the year of our Lord one thousand nine hundred and twenty-nine, at the township of Blandford in the said county of Oxford, did, having the charge of an automobile, by wanton or furious driving or other wilful misconduct or by wilful neglect, cause bodily harm to one Nancy Hay, against the form of the statute in such case made and provided."

It seems to me that the learned County Court Judge not only omitted to apply the cardinal principle of our criminal law that the accused is entitled to the benefit of every reasonable doubt, but that he also misapprehended the nature of the offence he was to try.

Section 285 reads: "Every one is guilty of an indictable offence and liable to two years' imprisonment who, having the charge of any carriage or motor-vehicle, automobile, or other vehicle, by wanton or furious driving, or racing or other wilful misconduct, or by wilful neglect, does or causes to be done any bodily harm to any person."

The most cursory perusal of this section leads to the conclusion, which is not at all varied by the most careful and meticulous examination of the language employed, that in this statutory offence are three elements, the absence of any one of which takes the case out of the statute—these are:—

(1) Wanton or furious driving or racing or other wilful misconduct or wilful neglect; (2) Bodily injury to some human being; and (3) This injury being caused by the conduct stated in (1).

It is no offence under this section to drive at any speed, to race, wilfully to neglect proper precautions or the like—however much such conduct is to be reprobated—unless bodily injury to some one follows—a person may, so far as this section is concerned, run amok and kill a dozen cattle—there is no offence. Again, serious injury may happen in the course of furious driving, etc., or follow it; but if this injury is not caused by the improper driving there is no offence under this section.

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The collocation of the adjectives employed, "wanton," "furious," "wilful," seems to me to indicate that there must be something of *mens rea* before the driving comes within the section; but this conclusion is not necessary for my decision—there is not a tittle of evidence to indicate that the unfortunate casualty was caused by the speed at which the accused was driving. The causal connection requisite, (3) above, is, I think, not proved or, indeed, so much as indicated—nor does the learned Judge find that it did exist.

The facts of the case are simple and not much in dispute; for all purposes, we may take the Crown's own witnesses.

A merry picnic party of young girls and a woman relative was being driven along what the Judge finds to have been "a fair, ordinary country road," the accused being at the wheel and attending to his driving, when suddenly took place what is called "shimmying." Apparently, the cause of this phenomenon is not thoroughly understood; and, although the Court is supposed to know mathematical facts, I confess that my knowledge of dynamics, whether aerodynamics, or other dynamical science, does not enable me to get at the cause of it; however, it came in with and is in some way connected with balloon-tyres. The effect of "shimmying" is to cause the wheels and, of course, the car, to waver, to wobble, and to become difficult to handle. It is impossible to foresee when and under what circumstances it will occur, and, when it does occur, it is sometimes impossible to retain control of the car.

In the present case, the "shimmying" disabled the accused from perfect control, the car ran into the ditch, and the unhappy result followed that one of the girls singing on the rear seat was killed.

In his Honour's written reasons for judgment, he says that there are few roads in the county better, "and any car driven over it at 35 miles an hour is perfectly safe, I think." He bases this conclusion upon his own experience, which, of course, he had no right to do—but I pass over this error, which may be quite innocuous. He then, in the remainder of the judgment, goes

App. Div. into the question of the speed, and that is all that he does consider—he concludes:—
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Riddell, J.A. “The Legislature of this Province has seen fit to limit the speed on our highways to 35 miles an hour, and a man who exceeds that, and, instead of 35 miles an hour over a country road, not a paved highway like the Government highways, most of them, but a fair, ordinary country road, a man who will drive over it at 50 miles an hour, I say, is driving most furiously and wantonly, and there is wilful misconduct in driving of that kind, and I find he was driving 50 miles an hour in the way I have just described. I have no hesitation in saying that he brings himself clearly within the provisions of that section for the reasons I have stated and I find him guilty as charged in the indictment.”

I think that, in arriving at the conclusion that the accused was driving at 50 miles an hour, his Honour has not given the accused his legal right to the benefit of every reasonable doubt; the whole evidence is much more consistent with 35 than with 50 miles an hour—but I pass that over.

There is no finding that the casualty was caused by the speed; and the evidence strongly indicates that the speed, even if it was 50 miles an hour, had not anything to do with it. The trouble which actually caused the swerving of the car was just as likely to occur with the car going 35 as 50 miles an hour. The causal relation was not established—indeed, if the onus had been upon the accused instead of upon the Crown, it was abundantly met by uncontradicted evidence. It was perfectly safe, according to the findings of the Judge, to go 35 miles an hour on that road, and the misfortune which actually happened was as likely to happen at 35 as at 50 miles an hour. It must be obvious that the speed was not the cause of this bodily harm, however wrong, dangerous and furious, it might be.

I can see no justification for this conviction, and it should be set aside; it would, however, be a public calamity if anything we say in this judgment should induce those driving automobiles to imagine that they have the right to drive as fast as they wish; the only point here decided is that the section mentioned does not apply to the facts of this case.

FISHER, J.A.:—The prisoner was convicted of “furious driving” under sec. 285 of the Code, and the sole question for determination on this appeal is, whether or not the prisoner is guilty beyond a reasonable doubt, on the evidence submitted by the Crown, upon whom the onus lies.

The two main witnesses as to the rate of speed at which the prisoner was travelling upon the highway a short time prior to the accident were Thomas Costello and Harry Taylor. Costello deposed that he was standing in front of his home, cutting grass with a lawn-mower distant from where the car was passing 700 to 800 feet, and on looking up saw the car passing. He gave Fisher, J.A. answers to questions as follows:—

“Q. And your opinion now is what, as to the speed? A. About 55 miles an hour

“Q. What do you consider this road to be, good or bad? A. I consider it good.

“Q. How fast have you travelled over it? A. I never exceeded 40 any place.

“Q. Any difficulty keeping your car on the road there? A. None whatever

“Q. Do you know if any repairs were done on this road after the accident? A. Yes, there was some done after the accident.

“Q. Was that necessary for the safety of the public? A. Not necessarily, no; they were only slight holes that were filled up

“Q. Had you ever before this had any occasion to time cars to see exactly how fast they were going? A. No.”

Harry Taylor was ploughing in a field adjoining the highway when he happened to look up and saw the car passing. He was distant from the point where the car was passing between 50 and 100 yards. He estimated the speed at about 55 miles an hour; and corroborated the evidence of Costello that the road was a good road and safe to travel on at 40 miles per hour. He says:—

“Q. And admitting you might have been mistaken, you mean he may not have been going faster than when you thought you were going 40 miles an hour? A. No, might not have been.

Both the witnesses had experience as drivers of their own automobiles. The prisoner swore that he was travelling about 35 miles an hour, and because the car developed “shimmying” he could not control it. The trial Judge refused to believe the prisoner’s evidence. None of the occupants of the car were able to give any decided opinion as to the rate of speed the car was travelling—two thought about 35 miles per hour, because they were not paying any particular attention, but, so far as they all knew, the car was being driven properly.

The trial Judge, after reviewing the facts, was of the opinion that the prisoner was guilty as charged in the indictment because

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App. Div. he was driving "most furiously and wantonly and at a rate of speed of over 50 miles per hour, and there was wilful misconduct."

1929. Counsel for the appellant contends that the cause of the accident was that the car suddenly developed a condition known as "shimmying," causing it to swerve from one side to the other; that the accused did everything possible to control the car; that the accident was not due to excessive speed; and that there is no evidence of gross or wanton misconduct.

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Fisher, J.A. that the accused did everything possible to control the car; that the accident was not due to excessive speed; and that there is no evidence of gross or wanton misconduct.

In *Rex v. Greisman* (1926), 59 O.L.R. 156, the Court of Appeal, following the definition of criminal negligence as laid down by the Court of Criminal Appeal in England, decided that, before there can be any criminal liability, it must be established that there was gross or wanton misconduct—there must be *mens rea*, and the Crown must prove a state of facts establishing such a disregard for the life and safety of others as to amount to a crime. See *Rex v. Bateman* (1925), 19 Cr. App. R. 8.

I cannot, after a careful reading of the evidence, discover exactly how the accident happened. If it was due to "shimmying"—about which I am quite doubtful—it is clear that the prisoner could not have, in the few seconds he had from the time the shimmying developed till the time of the accident, avoided it. Although it was not contended by the appellant that the swerving of the car was due to the holes or ruts in the road, might they not have been the cause of the sudden swerve to the left and then to the right? Who can tell with certainty, as those accidents happen in a moment, and it is significant that these holes or ruts were of sufficient importance to require repair-work on them after the accident? If they were the cause of the swerving or contributed to it, there is no evidence that the accused had knowledge of the existence of these holes or ruts, and therefore is not responsible for failure to control the car.

The Crown's witnesses as to furious driving were Costello and Taylor, and both hazarded the opinion that the accused was travelling at 55 miles per hour, but these witnesses were compelled to admit that they might be mistaken and that the rate of speed might have been less. For Taylor and Costello, whose only experience was in driving their own cars—at the places they stood and observed the passing car—to determine with any degree of certainty that the car was moving at a speed of 55 miles per hour, in my opinion was next to impossible, and the only reasonable and fair inference to be deduced from their evidence is, that the speed might be less than 55 miles an hour, but as to how much less the Court is left in the dark; and, when these witnesses placed the speed at 55 miles an hour or less, were they not simply

making the best "guess" they could? Surely there is a reasonably honest doubt here to which the accused is entitled, and in all the circumstances an absence of conclusive evidence that the accused was driving furiously or guilty of gross or wanton misconduct.

In my opinion, to convict the accused on such evidence would be a miscarriage of justice, and the appeal should be allowed and the conviction set aside.

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MASTEN, J.A.:—I agree.

ORDE, J.A.:—I agree.

LATCHFORD, C.J.:—I doubt, but do not dissent.

Appeal allowed.

[APPELLATE DIVISION.]

RE TOWNSHIP OF PICKERING AND COUNTY OF ONTARIO.

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Dec. 6.

Municipal Corporations—Replacing of Bridge over Stream in Township—Whether Bridge of Greater Length than 300 Feet—Inclusion of Approaches and Embankments—"County Bridge"—Declaration—Municipal Act, R.S.O. 1927, ch. 233, sec. 458 (1), (12)—Interpretation of—"Are Rendered Necessary"—Overflowing of Highway by Waters of Stream—Embankment Becoming Part of Highway.

Upon an application to a County Court Judge for an order declaring a bridge about to be built across a stream, in a township, to replace a bridge that had been carried away by a storm, to be a county bridge, the sole question was whether the bridge was or would be "of a greater length than 300 feet," within the meaning of sec. 458 of the Municipal Act. By subsec. 12 of that section, "the approaches to the bridge whether consisting of embankments or other artificial works to the extent to which they are rendered necessary on account of the waters of the . . . stream . . . overflowing the highway . . . shall be deemed for the purpose of this section to form part of the bridge." Before the approaches on the west side of the former bridge were constructed, the waters sometimes crossed the highway considerably west of a point 300 feet west of the eastern bank, and an embankment that far west was rendered necessary on account of the waters overflowing the highway, and, being then constructed, became part of the highway:—

Held, that sec. 458 must be interpreted reasonably, not with strict technicality; the words "are rendered" must be taken to apply to the state of affairs when the embankment was erected, so far, at least, as the situation had not been changed in the course of time —what was then "rendered necessary" must be considered still "rendered necessary"—and the embankment, as part of the approaches to the bridge, being included in calculating the length of the bridge, it would be "of greater length than 300 feet," and so should be declared to be a county bridge.

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AN appeal by the township corporation from the refusal of the Judge of the County Court of the County of Ontario to make an order under sec. 458 of the Municipal Act, R.S.O. 1927, ch. 233, declaring a bridge to be built over Duffin's Creek, in the township, to be a county bridge.

October 24. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

W. N. Tilley, K.C., and W. J. Beaton, for the appellant corporation, argued that the artificial embankments to the east and west of the proposed bridge form part of the bridge within the meaning of sec. 458 of the Municipal Act, and these embankments, to an extent exceeding 400 feet, are necessary for access to the proposed bridge, and to prevent the waters of the creek from overflowing the highway in times of freshets. A bridge of 300 feet or less would not be sufficient for the purposes required: *In re Mud Lake Bridge* (1906), 12 O.L.R. 159; *Re Casselman Creek Bridge* (1908), 15 O.L.R. 586; *Re Township of Maidstone and County of Essex* (1908), 12 O.W.R. 1190; *Re Township of Ashfield and County of Huron* (1917), 38 O.L.R. 538; *Re Township of Malahide and County of Elgin* (1917), 38 O.L.R. 600; *Re Township of Culross and County of Bruce* (1919), 17 O.W.N. 200; *Township of McNab v. County of Renfrew* (1905), 11 O.L.R. 180.

G. D. Conant, for the county corporation, respondent, contended that the embankment to the west of the bridge proper had become part of the highway, and so the length of the bridge as contemplated by the Act would only be as far west as the farthest western point at which the waters cross the embankment. The embankment is not an approach. The evidence shews that a bridge of 300 feet or less would be sufficient for the purpose required.

December 6. The judgment of the Court was read by RIDDELL, J.A.:—This is an appeal by the Corporation of the Township of Pickering from the decision of the County Court Judge refusing the application of the corporation for an order under sec. 458 of the Municipal Act, R.S.O. 1927, ch. 233.

Some years ago, a steel bridge was built over the historic Duffin's Creek, once a considerable river, but now, except in the spring and fall freshets, but a shadow of its original flood; the bridge was on the 5th concession-line and within the village of Whitevale. It replaced a former primitive wooden bridge; and had a span of 60 feet, centre to centre of the bearings, some two

feet longer than the span of that replaced, and was raised one foot higher.

In April, 1929, by a storm, the bridge was carried away, and it is now necessary to rebuild or replace it. The locus is somewhat uneven; on the east is a bank, so that the bridge could be built up to the edge of the stream, and, in fact, the eastern abutment was placed close up to this east side; on the west the edge of the stream does not seem to be well defined; but it was considered necessary—and, no doubt, it was necessary—to place an embankment, to raise the road to the level of the floor of the bridge and—at least much of it—to prevent the stream coming on the highway. The disaster of April, 1929, was occasioned by a flood which washed away a stretch of some 60 feet east of the east abutment, and destroyed the bridge. It became necessary to reconstruct the bridge, the township corporation made the application to the County Court Judge which has been refused, whereupon this appeal was taken.

Section 458(1) reads:—

“(1) A bridge of a greater length than 300 feet in a township may, on the application of the council of such township, be declared to be a county bridge where

“(a) It is used by the inhabitants of other municipalities;

“(b) It is situate on an important highway affording means of communication to several municipalities; and

“(c) On account of its length and for the reasons mentioned in clauses (a) and (b), it is unjust that the burden of maintaining and repairing it should rest upon the corporation of the township.”

Obviously, there are three prerequisites for placing upon the county the burden of building, maintaining, and repairing what would *prima facie* be a township bridge: the bridge must be (1) of a greater length than 300 feet; (2) be used by the inhabitants of other municipalities; and (3) be situate on an important highway affording means of communication to several municipalities. Of these requirements, the last two are admittedly present; and the real ground for the refusal is that the bridge is not more than 300 feet in length.

In determining what is meant by the length of a bridge, the earlier cases were somewhat strict: *In re Casselman Creek Bridge*, 15 O.L.R. 586; *Re Township of Ashfield and County of Huron*, 38 O.L.R. 538; Meredith's Municipal Act, pp. 587, 588, notes on sec. 449 (now 458). The supposed hardship was rectified by the Act 7 Geo. V. ch. 42, sec. 21, which made the provision now sec. 458(12), which reads:—

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And to provide for the case of a proposed bridge not yet erected—which, according to the decision in *Re Township of Malahide and County of Elgin*, 38 O.L.R. 600, did not come within the Act, the same Legislature passed a subsection (now sec. 468(13)) reading:—

"This section shall also apply to a bridge which it is proposed to construct, including a bridge to replace an existing one and a bridge to replace one that has been carried away or destroyed or so damaged that it is necessary to rebuild it, and the application may be made before the work of construction is begun."

The work coming squarely within the statute, the sole question is whether the bridge is more than 300 feet in length.

The facts seem to be quite clear. On evidence that is not really attacked by witnesses or even before us in argument, before the approaches on the west side of the bridge were constructed, the waters sometimes "in times of freshets," and perhaps at other times, crossed the highway considerably west of a point 300 feet west of the eastern bank. An embankment was necessary that far west, at least; it was "rendered necessary on account of the waters of the . . . stream . . . overflowing the highway"—that this embankment also raised the bed of the road up to the level of the bridge is *nihil ad rem*, although I am far from saying or suggesting that an embankment which has for its sole function the raising of the road to the level of the bridge and does not interfere with the waters of the stream comes within the subsection.

The embankment to the west of the bridge proper has become part of the highway; and the contention of the county in the last analysis is that, the embankment being part of the highway, in calculating the length of the bridge, one must go so far west, only, as the farthest western point at which the waters cross the embankment, so having been made part of the highway—in other words, by reason of the existence of the present structure, there is no necessity of any further embankment to the west of the point at which, in the present state of affairs, the waters cross the highway.

To express it in a little different terminology, it is asked, "How can any embankment *now* be rendered necessary on account of the waters overflowing the highway, where the waters do not overflow the highway?"

The argument is ingenious, but, I think, fundamentally unsound—as well might it be objected, in the case of a standing bridge, that embankments were not necessary on account of such overflow, because there was no overflow.

The Act must be interpreted reasonably, not with strict technicality; and the words "are rendered" apply to the state of affairs when the embankment was erected, so far, at least, as the situation has not been changed in the course of time. We must look at the situation at the time of the erection of the embankment, and the necessity at that time; and, so far as the situation continues to subsist, consider what was then rendered necessary, still "rendered necessary."

I would allow the appeal with costs, here and below, and refer the matter back to the County Court Judge to act under subsec. (5) and determine as in that subsection directed.

Appeal allowed.

[APPELLATE DIVISION.]

HIGHLEY v. CANADIAN PACIFIC RAILWAY Co.

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Railway—Farm-crossing—Injury by Train to Motorists Attempting to Cross—Findings of Jury—Failure to Give Statutory Signal on Approaching Highway-crossing before Reaching Farm-crossing—Application of sec. 308 of Railway Act, R.S.C. 1927, ch. 170—Motion for Nonsuit—Failure of Motorists to Look or Listen for Approaching Train—Absence of Negligence of Railway Company at Common Law—Admission of Counsel on Point of Law—Right to Withdraw.

The plaintiff and her husband, seated in a motor-vehicle driven by the former, attempted to cross the defendants' railway upon a farm-crossing, when the vehicle was struck by a train of the defendants and the plaintiff was thereby injured and her husband killed. At the trial of an action brought to recover damages for the injury and death, the trial Judge refused a motion for a nonsuit at the close of the plaintiff's case, and submitted the case to the jury, who found negligence of the defendants in "not blowing the whistle at whistle-post for side-road 10," negatived contributory negligence on the part of the plaintiff's husband, and awarded damages to the plaintiff:—

Held, upon appeal, that the case should have been withdrawn from the jury and the action dismissed.

Jewell v. Grand Trunk Railway Co. of Canada (1923-4), 55 O.L.R. 68, 617, followed.

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A farm-crossing is not a highway-crossing, and sec. 308 of the Railway Act, R.S.C. 1927, ch. 170, which requires, in the case of a train approaching a highway-crossing at rail level, that the engine-whistle shall be sounded at least 80 rods before reaching the crossing, has no application to a farm-crossing.

Dictum of SEDGEWICK, J., in Grand Trunk Railway Co. v. Anderson (1898), 28 Can. S.C.R. 541, at p. 550, disapproved.

The plaintiff and her husband, upon the evidence, failed to look and listen for an approaching train, and a situation was created by them that negatived any possible negligence on the part of the defendants.

At the trial counsel for the defendants admitted that the plaintiff and her husband were entitled to rely upon the defendants sounding the whistle at the public crossing, but when before the appellate court refused to be bound by that admission:—

Held, that, as it referred to a point of law, he was entitled to withdraw it.

Held, also, that the plaintiff was not entitled to rely on the absence of the statutory signal at the highway-crossing as an act of negligence, and had failed to prove any common law liability on the part of the defendants.

An appeal by the defendants from the judgment of McEvoy, J., noted 37 O.W.N. 243, in favour of the plaintiff, upon the findings of a jury, for the recovery of damages for the death of her husband and also for personal injuries sustained by herself, both caused by a motor-car in which she and her husband were driving being struck by a train of the defendants when upon a private crossing.

The learned trial Judge refused a motion for a nonsuit and allowed the action to go to the jury, who found negligence of the defendants' servants in "not blowing the whistle at whistle-post for side-road 10," and no contributory negligence of the plaintiff or her husband, who was driving the motor-car, and assessed the plaintiff's damages at \$5,000.

October 25. The appeal was heard by LATCHFORD, C.J., RIDDELL, ORDE, and FISHER, J.J.A.

Angus MacMurchy, K.C., and *S. J. Dempsey*, for the appellants. The jury, in finding no negligence on the part of the plaintiff or her deceased husband, inferentially find that their failure to look for an approaching train before passing over the railway track was not negligence. The trial Judge found as a fact that neither the plaintiff nor her husband did look for the approaching train. This failure to look was negligence and was the negligence which caused the accident: *D'Andrea v. Michigan Central Railroad Co.* (1929), 37 O.W.N. 26. No reasonable jury could find otherwise. Upon the grounds of common sense and natural self-preservation the plaintiff owed a duty to herself, in approaching a known and open place of danger where trains are

liable to pass at any time, to look for approaching trains. There is no rule of law in Ontario that a person approaching a level railway crossing must stop, look, and listen, but such person does owe a duty to act reasonably in the circumstances. To drive blindly across a railway track, known for many years to the plaintiff and her deceased husband, was not acting reasonably and was negligence on their part. In the alternative the plaintiff was guilty of contributory negligence. The defendants were not obliged to sound the whistle for the farm-crossing. The provisions of sec. 308 of the Railway Act, R.S.C. 1927, ch. 170, do not apply to a farm-crossing. The dictum of Sedgewick, J., in *Grand Trunk Railway Co. v. Anderson* (1898), 28 Can. S.C.R. 541, was *obiter*; see *Wallman v. Canadian Pacific Railway Co.* (1906), 16 Man. R. 82; *Casey v. Canadian Pacific Railway Co.* (1888), 15 O.R. 574. The learned trial Judge found that the plaintiff and her husband were not identified. While we are not arguing identification, we submit that the husband and wife were engaged in a common enterprise and were facing a common danger known to both, and that the plaintiff was responsible for her own injury, as she failed to use reasonable care in neglecting to look for an approaching train. In any event, a duty rests upon a passenger or guest in an automobile to exercise ordinary care for his or her own protection. It is not a question of imputing negligence of the driver to the guest, but whether the guest himself exercised due care: *Reynolds v. Canadian Pacific Railway Co.* (1926), 59 O.L.R. 396, and in the Supreme Court of Canada, [1927] S.C.R. 505, 33 Can. Ry. Cas. 55; *Baltimore and Ohio R. R. Co. v. Goodman* (1927), 275 U.S. 66; *Ryan v. Delaware Lackawanna and Western R. R. Co.* (1925), 8 Fed. Repr. (2nd series) 138; *Von Bergen v. Erie R. R. Co.* (1918), 70 Penna. Superior C.R. 46, especially at p. 49; *Fogg v. New York New Haven and Hartford R. R. Co.* (1916), 223 Mass. 444, especially at p. 448; *Atchison T. & S. F. Ry. Co. v. McNulty* (1923), 285 Fed. Repr. 97; *Pennsylvania Co. v. Stahl* (1912), 34 Ohio Circ. 157, especially at p. 163. Upon the evidence of the plaintiff herself, the learned Judge should, at the close of the plaintiff's case, have withdrawn it from the jury and dismissed it: *Jewell v. Grand Trunk Railway Co. of Canada* (1923-4), 55 O.L.R. 68, 617.

I. B. Lucas, K.C., and *F. B. Evans*, for the plaintiff, respondent. The plaintiff acted with reasonable care in approaching the crossing. Her evidence was not definite that she had not looked to see if a train was coming. She said that she did not know whether she had looked or not. We contend that her memory was wiped out by the accident. A fair reading of her whole evidence

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is that she did not know whether she had looked or not, and in any event it was for the jury to determine which of her statements as to looking was correct. In the *Jewell* case, 55 O.L.R. 68 and 617, the facts were different; the plaintiff there was flagrantly negligent. It was a question for the jury whether the plaintiff was negligent in not looking: *Canadian National Railways v Clark* (1923), 29 Can. Ry. Cas. 45, [1923] S.C.R. 730; *Dublin Wicklow and Wexford Railway Co. v. Slattery* (1878), 3 App. Cas. 1155, at pp. 1165-6 and 1173. A finding that the plaintiff was not negligent is not perverse. The provisions of sec. 308 of the Railway Act apply to this farm-crossing, and the plaintiff was entitled to the warning of the whistle at the whistle-post: *Grand Trunk Railway Co. of Canada v. Anderson* (1898), 28 Can. S.C.R. 541. It was open to the jury to find that the whistle had not been sounded at the whistle-post for side-road 10. The farm-crossing was used by the public in going to and from McWilliams station, and any one using that crossing was entitled to the statutory warning. There may have been concurrent negligence, and the case was properly submitted to the jury.

December 6. FISHER, J.A.:—The defendants appeal from the judgment entered for the plaintiff by Mr. Justice McEvoy on the findings of a jury. The jury made only one finding of negligence, "Not blowing the whistle at whistle-post for side-road 10," negatived contributory negligence on the part of the husband of the plaintiff, and awarded the plaintiff \$5,000 damages.

To understand the main points involved in this appeal it is necessary to refer to the following facts: The plaintiff's husband was driving an automobile in which the plaintiff, his wife, was seated with him in the front seat—there were no other occupants in the car; they were proceeding in a southerly direction and had to cross the defendants' railway tracks at a *farm-crossing*; about 900 feet west of this crossing is a *public crossing* known as the 10th concession-line, and a freight train was proceeding in a westerly direction; the plaintiff and her husband, while passing over the defendants' tracks at the farm crossing, were struck, the husband killed and the plaintiff seriously injured. The defendants moved at the close of the plaintiff's case, and again after the findings by the jury, for a dismissal of the action, and the learned trial Judge, for the reasons given in his judgment (1929), 37 O.W.N. 243, 35 Can. Ry. Cas. 312, dismissed the application.

For two reasons, I am of opinion that the defendants' motion for a dismissal should have succeeded and the action should have been dismissed.

The first reason is this. The finding of the jury that the whistle did not blow 80 rods before the train reached the 10th sideroad (public crossing) is of no assistance to the plaintiff, and the plaintiff is not entitled to rely on that as an act of negligence, because the plaintiff and her deceased husband were not using the public crossing over which the defendants' train was passing when the accident happened. They were, as stated, using a "farm-crossing" distant some 900 feet easterly from the public crossing; and sec. 308 of the Railway Act, R.S.C. 1927, ch. 170, has, in my opinion, no application whatever to a farm-crossing. Under the heading of "Precautions at Highway Crossings" is to be found sec. 308, which reads:—

"When any train is approaching a highway-crossing at rail level the engine whistle shall be sounded at least 80 rods before reaching such crossing, and the bell shall be rung continuously from the time of the sounding of the whistle until the engine has crossed such highway."

This section, I take it, was passed for the protection and benefit only of all those who were rightfully upon the track as well as upon the highway crossing in passing or re-passing over a line of railway. This section was never intended to mean and does not mean that a warning is required to be given by the blowing of a whistle or ringing of a bell for a farm-crossing. The only cases we were referred to or that I can find are *Casey v. Canadian Pacific Railway Co.*, 15 O.R. 574, 581, and *Wallman v. Canadian Pacific Railway Co.*, 16 Man. R. 82, 6 Can. Ry. Cas. 229. In the *Casey* case, MacMahon, J., expressed himself as follows:—

"The statutory obligation imposed upon railways to ring a bell or blow a whistle applies only to the occasions when the engine approaches a place where the railway crosses the highway."

The word "highway," as interpreted by sec. 2 (11), "includes any public road, street, lane or other public way or communication." No one, I think, would seriously argue that a farm-crossing, made for the convenience of a farm, answers to that definition of a highway.

In the *Wallman* case a dictum of Mathers, J., is to be found in 16 Man. R. at p. 88, and 6 Can. Ry. Cas. at p. 234, as follows: "I entertain considerable doubt as to whether that section can be invoked on the plaintiff's behalf. It seems to me it was enacted for the benefit of those using the highway-crossing, and not for the benefit of those otherwise upon the railway, and that, as the failure to comply with that section involves no breach of duty

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of which the deceased had a right to complain, it was not negligence of which he could take advantage."

If my construction of sec. 308 is the right one, and I am of opinion that it is, it must follow that the finding of negligence in not blowing the whistle must be set aside. It may be that the learned trial Judge would have arrived at a different conclusion had it not been for the admission made by counsel for the defendants that the Highleys were "entitled to rely upon the defendants doing that duty (the blowing of the whistle on the public crossing) for the benefit of any one using the farm-crossing," but counsel for the appellants, in the argument before this Court, refused to be bound by any such admission; and, as it referred strictly to a point of law, and not to one of fact, he is entitled to change his mind.

The second reason brings up for discussion the question whether the defendants were guilty of any negligence under the common law. To answer that question is but to ask one: "What did the defendants do or omit to do in all the circumstances of this case?" If there were no acts of omission or commission, in any duty which the defendants owed the plaintiff and her husband, it follows that there could be no negligence unless the defendants were compelled to blow for a farm-crossing. Those in charge of the train had no notice whatever that the plaintiff's car was approaching and intended to pass over the farm-crossing; and no one suggests, owing to a slight curve in the railway, that those in charge of the engine could possibly see the plaintiff or her husband, or their car, until the engine reached a point distant about 360 feet east of the farm-crossing, or that if any one could be seen, a heavy freight train travelling, as this one was, about 35 miles per hour, and which would cover 360 feet in about 10 seconds, could have been stopped in time to avoid the accident. If this is all true, then wherein is to be found a scintilla of evidence of negligence on the part of the railway company? Is not a full and complete answer to be found in the conduct of the driver of the automobile, in that neither the plaintiff nor her husband had looked before they proceeded to pass over the tracks, as was found by the trial Judge? And that finding is, in my opinion, fully supported by the evidence. The plaintiff and her husband were comfortably seated in their car; it was broad daylight; the railway crossing was in full view in a quiet part of the country; there was nothing to distract their attention, nor were they busy with anything but the car, and they both knew, as every one knows, that when approaching a railway track, where trains have the right of way and are liable to be passing at any moment, they

were approaching a place of danger. Then what possible excuse could there be for not looking? And no explanation has been offered why they did not look. Now, had they looked what would have happened? They would have seen, about 360 feet to their left, an approaching train, and, as their car was not much more than moving—going at between 5 and 6 miles per hour—they could have stopped almost instantly, and no accident would have happened.

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I think, too, that it must be found on the evidence that neither the plaintiff nor her husband *listened*, because, if they had—their hearing being good—they would have heard, as their own witnesses swore they heard, a whistle from an engine blowing about a mile east of the public crossing, and it is to be noted that these witnesses had not the same favourable advantage as the plaintiff and her husband, as they were, at the time they heard the whistle blow, busily engaged in assisting at a threshing, with all the noise incidental thereto, and, again, what possible reason is there for the plaintiff or her husband—the wind being favourable—not hearing the *noise* of the approaching train, before or when it reached the 360 foot limit? The only possible answer is that they were paying no attention whatever, at a place where they shou'd have been paying every attention, and a situation was suddenly created by them that negatived any possible negligence by the defendants.

My conclusions are that neither the plaintiff nor her husband is or was entitled to rely on the absence of the statutory signal at the public crossing as an act of negligence, and that the plaintiff has failed to prove any common law liability on the part of the defendants; and, with great respect, I am of opinion that the trial Judge, following a judgment of my brother Orde in *Jewell v. Grand Trunk Railway Co. of Canada*, 55 O.L.R. 68, affirmed in appeal, *ib.* 617, should have, at the close of the plaintiff's case, withdrawn the action from the jury and dismissed it.

I have fully considered the dictum of Mr. Justice Sedgewick in *Grand Trunk Railway Co. v. Anderson*, 28 Can. S.C.R. 541, at p. 550, "that the provision of the Railway Act, section 256, relating to the sounding of the whistle and the ringing of the bell, was not complied with, and that all persons rightfully upon the railway track as well as upon the highway-crossing next to the coming train are entitled to the advantage of this provision." This is merely a dictum and not binding, and I do not think it can be sustained.

The appeal must be allowed with costs, and the action dismissed with costs, if demanded.

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LATCHFORD, C.J.:—I agree.

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RIDDELL, J.A.:—I agree and have nothing to add.

ORDE, J.A.:—I agree in the result.

Appeal allowed.

[APPELLATE DIVISION.]

1929. TORONTO GENERAL TRUSTS CORPORATION v. CANADIAN NATIONAL
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Railway—Injury to Land of Neighbour Originating in the Digging of Pits in Railway Land—Cause of Action—Permitting Escape of Water from Pits—Release by Plaintiffs' Testatrix of all Claims Arising out of Construction of Railway not a Defence—Findings of Jury—Breach of Common Law Duty—Time-limit for Bringing Action—Ontario Limitations Act, secs. 48 (1) (g)—Dominion Railway Act, sec. 391, Inapplicable—Injunction against Continuance of Wrong—Damages.

The judgment of RANEY, J., 63 O.L.R. 320, was reversed.

Held, that the real cause of action was not the digging of pits by the defendants upon their own land, but that they did not prevent the water they had collected in the pits from escaping to do injury to their neighbour—a breach of a common law duty imposed upon the defendants and quite independent of the circumstances that they were a railway company and that the pits were dug on railway property; and a release given by the plaintiffs' testatrix of all her claims and demands arising out of the construction on her land of a line of railway was not a defence to the action.

2. By the first clause of their second finding the jury meant that the injury complained of owed its origin to the pits, and that, and the other findings of the jury, including the second clause of the second finding, that the omission of the defendants which caused the damage was their failure properly to drain the pits, were well supported by the evidence; and a breach of a common law duty was established.
3. The limitation section (391) of the Railway Act, R.S.C. 1927, ch. 170, is not applicable, the right sought to be enforced not arising from the statute and having no reference to the status of the defendants.
4. The action was "upon the case" for damages, and such an action must be brought within 6 years after the cause of action arose: Limitations Act, R.S.O. 1927, ch. 106, sec. 48 (1)(g); the plaintiffs then were entitled to damages accrued 6 years or less before the commencement of the action, and might bring another action or other actions for damages subsequent thereto.
5. The plaintiffs were entitled to an injunction against the continuance of the wrong complained of; or, if the defendants preferred it, they should pay \$1,000 (which the plaintiffs were willing to accept) and be relieved of further responsibility for the continuance of the wrong.

AN appeal by the plaintiffs from the judgment of RANEY, J., 63 O.L.R. 320, after trial by a jury, whereby he dismissed the action, which was brought against two railway companies to recover damages for injury to the plaintiffs' land near the railways by digging pits in the railway lands.

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November 19. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

R. S. Robertson, K.C., and *G. P. Campbell*, for the appellants, argued that the limitation section (391) of the Railway Act, R.S.C. 1927, ch. 170, does not apply to the present action, in which the claim is for relief at common law, the ground of complaint being that the defendants have failed to prevent water which they had collected on their land from escaping on to the land of the appellants to the injury of the appellants. The case was governed by *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; see also *Campbell v. Township of Morris* (1923), 54 O.L.R. 358, at pp. 382, 383. The jury's answer to question 2 obviously meant this. Even the 6-year limitation does not apply, because that limitation is statutory; and there is no limitation at common law: *Delbridge v. Township of Brantford* (1917), 40 O.L.R. 443; *Kerr v. Atlantic and Northwest Railway Co.* (1895), 25 Can. S.C.R. 197; *McCrimmon v. B.C. Electric R. Co.* (1915), 24 D.L.R. 368; *Earl of Harrington v. Corporation of Derby*, [1905] 1 Ch. 205; *Hague v. Doncaster Rural District Council* (1908), 100 L.T.R. 121; *Rex v. Marshland Smeeth and Fen District Commissioners*, [1920] 1 K.B. 155, at p. 173. In any case, whether the limitation section of the Railway Act applies or not, the appellants are entitled to an injunction.

R. E. Laidlaw, for the defendants, respondents, contended that the facts of this case did not bring it within *Rylands v. Fletcher*, because in that case the water was artificially stored. There could be no liability for damming back or storing natural water: *McGillivray v. Millin* (1867), 27 U.C.R. 62; *Crewson v. Grand Trunk Railway Co.* (1867), 27 U.C.R. 68; Gould on Waters, 3rd ed., pp. 536, 549; *Ostrom v. Sills* (1898), 28 Can. S.C.R. 485. The filled pits acted as a wall of water to prevent the surface-water flowing on the appellants' land. The jury did not find that the water was thrown back, but only that the respondents dug the pits and did not drain them. What happened would have occurred if the respondents had built a stone wall, and so they were not liable at common law. There being no liability at common law, the remedy sought by the appellants must be under the statute, if there is any right of action at all: *Woods v. Canadian Pacific Railway Co.*

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(1908-10), 13 O.W.R. 49, 16 O.W.R. 313, at p. 326; *Wolverhampton New Waterworks Co. v. Hawkesford* (1859), 28 L.J.C.P. 242. The respondents are relieved from any liability by a clause in the deed from the deceased to the railway company. The case is properly within sec. 391 of the Railway Act, the limitation section, and the cause of action was complete in 1916. The respondents were liable for two years only if they were liable at all: Lightwood's Time Limit on Actions, p. 399.

December 6. The judgment of the Court was read by RIDDELL, J.A.:—This is an appeal from the judgment of Mr. Justice Raney, after trial by a jury at Cobourg, whereby he dismissed the action.

By reason of the sensible position taken by counsel for the defendants, we are relieved from considering the somewhat difficult question as to which of the companies is liable, if either; and the sole question to be discussed is the liability of the company which has the control of the property in which are the pits spoken of in the pleadings.

The facts are that, some years ago, a railway company, having a right so to do, built a line across the farm of the deceased whose administrator brings this action. Either at this time or later, the company dug deep pits on its own property bought from the deceased for a right of way, and alongside their track, not, however, reaching out to the limits of the land so acquired. These pits have been retained, although the line of railway has been abandoned for some time. The plaintiffs allege that these pits are allowed to fill with water, and that consequently, no care being taken to prevent the seeping of water from the pits, the adjoining land of the deceased was seriously injured.

Several defences were raised by the defendants, all but one of which were left undecided by the learned trial Judge—these may conveniently be dealt with first.

It is argued for the defence that the action depends upon a right given, if it is possessed at all, by the Railway Act; and that the only method of prosecuting such a claim is under the Railway Act itself. In support of this defence is cited, *inter alia*, the decision in *Wolverhampton New Waterworks Co. v. Hawkesford*, 28 L.J.C.P. 242, referred to in *Woods v. Canadian Pacific Railway Co.*, 16 O.W.R. 313, at p. 326. No one can dispute the law as laid down in that case:—

“Where the statute creates a liability not existing at Common Law, and gives a particular remedy for enforcing it it has always been held that the party must adopt the remedy given by the statute.”

Were the cause of action the digging of the pits originally, some consideration might be given to this argument; but such is not the fact. The company might dig pits all along the right of way, and no one could complain; the company might collect in these pits surface-water or water which came on the "right of way" without incurring liability to any one; the real ground of complaint is that the company did not prevent the water they had collected in the pits from escaping to do injury to the neighbour. This is a breach of a common law duty, imposed upon the company in common with all others so collecting water; it is wholly independent of the circumstance that the defendant is a railway company and of the fact that the pits are dug on railway property.

Then it is alleged that the deceased, in her deed to the railway company of the land in which the pits are dug, gave a release of this cause of action. The language employed is as follows:—

"The grantor hereby releases to the grantee all her claims upon the said lands, and further releases the grantee from all claims and demands for severance or depreciation, or arising out of the expropriation or taking by the grantee of the said lands, or the construction thereon of a line of railway."

It must be perfectly obvious that the neglect of the ordinary common law duty here had absolutely nothing to do with the "construction of a line of railway;" consequently, this defence also fails.

The sole questions for determination are, whether there was a failure to prevent the escape of the waters stored in the pits into or upon the adjoining land, and whether the waters so wrongfully allowed to escape were the cause of the injury alleged.

The jury have found, upon satisfactory evidence, the following, with which (subject to one remark) we cannot, I think, interfere:—

"1. Have the lands of the plaintiffs been injured by the defendants or either of them? A. Yes.

"2. If so, what acts or omissions of the defendants caused such injury? A. The act of the defendants which caused the damage was the digging of the borrow-pits—the omission of the defendants which caused the damage was the failure of the defendants to fully drain the borrow pits.

"3. If the plaintiffs' lands have been injured, how many acres have been affected? Ten acres.

"4 (a) When did such injury commence? A. 1912.

(b) When did the injured area become affected as at present? A. 1916.

(c) Does the injury still continue? A. Yes.

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"5. At what sum do you assess the yearly damages suffered by the plaintiffs A. During the years 1912-13-14-15 damage per acre being \$5 per year. On and after 1916 damage per acre being \$11 per year.

"6. To what amount is the present value of the lands of the plaintiffs affected? A. \$1,000.

The remark spoken of is concerning the answer to the second question. It is plain what the jury meant, that is, that the injury complained of owed its origin to the pits—and that cannot, I think, be disputed.

Admitting that there was a breach of the common law duty already mentioned, illustrated by such cases as the famous *Rylands v. Fletcher*, L.R. 3 H.L. 330, the duty itself being but an instance of the maxim, *Sic utere tuo ut non alienum laedas*, so fully and accurately discussed in Broom's Legal Maxims, 9th ed., at pp. 244 *et seq.*, and admitting further that this was the cause of the injury to the adjoining land, it necessarily follows that the defendants are liable in damages.

The next question is: "What, if any, limitation is there to the recovery?"

As to this, I have no doubt that the limitation of the Railway Act has nothing to do with the question, the right sought to be enforced not coming from the statute and having no reference to the status of the defendants. And, being a matter of "property and civil rights," pure and simple, and nothing else, we must turn to the legislation of the Province to find what is the limitation or if there is any restriction. I do not accede to Mr. Robertson's argument that there is no restriction; claiming that we have to deal with a Common Law right, and having that determined in his favour, he must submit to the rule laid down by the Legislature as to how far that right extends.

This is an "action upon the case" for damages, the result of the tort of allowing water to escape which should have been kept at home; the statute is plain that such an action must be brought within 6 years after the cause of action arose: Limitations Act, R.S.O. 1927, ch. 106, sec. 48 (1) (g). The plaintiffs then are entitled to damages accrued 6 years or less before the *teste* of the writ; and may bring another action or other actions for damages subsequent thereto; this is not a case of continuing damage caused by one act or omission, and we cannot assess the damages subsequent to the *teste* of the writ under our Rule.

There is, however, another relief which the plaintiffs claim, i.e., an injunction against the continuation of the wrongs complained of; and I am of opinion that that relief must be granted.

If the wrong is continued sufficiently long, it will ripen into an easement; and that the plaintiffs have the right to be protected from. I think the injunction should go, as asked. It may be, however, that the defendants will prefer to pay the sum of \$1,000, which the plaintiffs express willingness to accept, and be relieved of any further responsibility for the continuation of the evil. All parties agreeing, a judgment may go for \$1,000. Costs of this appeal and of the action should go to the plaintiffs.

If the parties cannot agree as to amounts, etc., one of us may be spoken to.

Appeal allowed.

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[KELLY, J.]

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Dec. 6.

Company—Bankruptcy of—Unpaid Claims for Wages—Whether Assignable—Action by Assignee of Claims against Directors under Ontario Companies Act, sec. 100—Continued Existence of Company after Bankruptcy—Directors Continuing in Office—Bankruptcy Act, secs. 6, 9 (4), 11—Companies Act, secs. 229, 230.

Claims of employees of an incorporated company against its directors for wages may be validly assigned, and the assignee may sue the directors for the amount of the claims, pursuant to sec. 100 of the Ontario Companies Act, R.S.O. 1927, ch. 218.

Lee v. Friedman (1909), 20 O.L.R. 149, followed.

An incorporated company does not cease to exist when it is declared bankrupt, though the scope of its activity is limited because of its inability to carry on its business.

Sections 6, 9 (4), and 11 of the Bankruptcy Act, R.S.O. 1927, ch. 11, and secs. 229 and 230 of the Ontario Companies Act, considered.

The debtor-company in this case having continued in existence, the persons sued as executors had not ceased to be such, there being no evidence of their resignation or of any act of theirs or of the company putting an end to their position as directors; and judgment was given against them for the amount sued for by the assignee of wages-claims.

MOTION by the plaintiff for judgment upon the pleadings in an action against directors of an incorporated company for unpaid wages of the plaintiff and other employees of the company whose claims had been assigned to the plaintiff.

The motion was heard by KELLY, J., in the Weekly Court, Toronto.

H. H. Davis, K.C., for the plaintiff.

J. B. Allen, for the defendants.

December 6. KELLY, J.:—On the 21st January, 1927, William Cane & Sons Co. Ltd., incorporated under the Ontario Companies

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Act, was adjudged bankrupt and a receiving order was made against it and a custodian of the bankrupt estate appointed; the custodian was later appointed trustee in bankruptcy. At the time of the receiving order the defendants were directors of the company and had been such for at least one year prior to that date. The company was then indebted to a large number of its employees for wages—in no case exceeding the wages for one year—incurred for services performed during the time the defendants were such directors. Claims for these wages were filed with the trustee in bankruptcy, and all except that of the plaintiff were assigned by the claimants to him, and notice of the assignment was given to the defendants. The plaintiff now sues to recover from the defendants the total of these claims and his own, which he places in the aggregate at \$4,582.73; the defendants, while admitting that the claims were filed, allege that as filed they total only \$4,478.86, and, pleading sec. 100 of the Ontario Companies Act, R.S.O. 1927, ch. 218, they deny liability. The plaintiff has now moved for judgment for \$4,478.86 with interest and costs.

Section 100, subsec. 1, of the Companies Act declares that the directors of a company shall be jointly and severally liable to the labourers, servants, and apprentices thereof for all debts not exceeding one year's wages due for services performed for the company while they were such directors respectively. Subsection 2 declares that a director shall not be liable under subsec. 1 unless (a) the company has been sued for the debt within one year after it became due and execution has been returned unsatisfied in whole or in part; or (b) the company has, within that period, gone into liquidation or has been ordered to be wound up and the claim for such debt has been duly filed and proved, nor unless he is sued for such debt while a director or within one year after he has ceased to be a director.

On the argument it was suggested that the other claimants had not the right or power to assign their claims to the plaintiff; and, even if they had such right or power, the plaintiff has not the right to sue for recovery of the amount of the claims so assigned. The question of such assignability and right to sue was discussed and disposed of in a manner favourable to this plaintiff's case in *Lee v. Friedman* (1909), 20 O.L.R. 149.

More important questions are: (1) whether the defendants continued to be directors after the commencement of the bankruptcy proceedings; and (2) whether they were sued while they were such directors or within one year after they ceased to be such. For present purposes going into bankruptcy is properly regarded as going into liquidation as referred to in sec. 100, subsec. 2 (b), of

the Companies Act. An authorised assignment under the Bankruptcy Act is not necessarily a winding-up. Nor in the case of a company-debtor does it put an end to the company, which really continues in existence, though the scope of its activity is limited because of its inability to carry on its business. Its corporate existence still continues. On the making of a receiving order the debtor's property affected by it is deemed to be in the custody of the Court, and on a trustee being appointed as provided by the Act it forthwith passes to and vests in such trustee. The purpose of this is that it may be disposed of or otherwise administered so as to go in liquidation of the debtor's debts. From several sections of the Bankruptcy Act the inference is that it was not intended that, in the case of a company-debtor, a company's existence should come to an end; but indeed the contrary. I refer to sec. 6; sec. 9, subsec. 4; and particularly to sec. 11.

This latter section contemplates acts on the part of a debtor which would be impossible, in the case of a company-debtor, if the company ceased to exist on its becoming bankrupt under the Act.

Moreover, the Act contemplates a discharge of a debtor on his debts being satisfied by payment or otherwise; in such event there is nothing to prevent the debtor continuing or re-engaging in business, which would be impossible in the case of a company if its legal existence had already come to an end.

Then again, the inference to be drawn from secs. 229 and 230 of the Companies Act is that, even in winding-up proceedings, a company is regarded as still in existence down to the time that its affairs are fully wound up; for the liquidator, on that happening, is required to call a general meeting of the shareholders or members of the corporation for the purposes therein named, which meeting shall be called in the manner provided by the by-laws for calling general meetings, and the liquidator is further required to make to, and file with, the Provincial Secretary, a return of such meeting having been held and the date thereof; and at the expiration of three months from the date of the filing the corporation shall *ipso facto* be dissolved. Notwithstanding this provision, however, the Court may, at any time after the affairs of the corporation have been fully wound up, make an order dissolving the corporation, which shall be dissolved at and from the date of such order. These would be useless provisions if the company had already ceased to exist.

The position of a company which has made an authorised assignment under the Bankruptcy Act was considered in *Re Canadian Cereal and Flour Mills Co. Ltd.* (1921), 51 O.L.R. 316.

The company having, therefore, continued in existence, it

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remains to be determined whether the defendants ceased to be directors. There is no evidence of their resignation or of any act either of theirs or of the company putting an end to their position as directors. On their own evidence, they had no business communications with the company and there was no meeting of the directors subsequent to the assignment in bankruptcy; and there is no evidence that they took any steps to resign or otherwise discharge themselves from their obligations as directors.

In my opinion, they have not ceased to be directors, though their powers were curtailed by the bankruptcy proceedings.

The plaintiff is entitled to judgment for the amount asked in the notice of motion, namely, \$4,478.86, with interest from the commencement of the action (4th August, 1928) and costs.

[IN CHAMBERS.]

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RE GRAWBARGER AND MOYER.

Dec. 12.

Illegitimate Child—Inquiry as to Parentage—Children of Unmarried Parents Act, R.S.O. 1927, ch. 188, sec. 1 (a)—Amendment by 19 Geo. V. ch. 23, sec. 10—“Judge of the Court”—“Judge of a Court”—Territorial Jurisdiction—Motion for Prohibition—Rules for Interpretation of Statutes.

The first Children of Unmarried Parents Act, passed in 1921, 11 Geo. V. ch. 54, repealed the Illegitimate Children's Act, R.S.O. 1914, ch. 154, and constituted a statutory court which had jurisdiction, *inter alia*, to inquire and determine whether a person charged is the father of an illegitimate child and, if so, to order him to pay the mother's reasonable expenses and to contribute to the maintenance of the child. By the Act of 1921, secs. 13 and 18, this jurisdiction was conferred upon “the Judge,” interpreted in sec. 3 (a) as meaning the “judge of the county or district court,” and this interpretation was carried into the Children of Unmarried Parents Act, R.S.O. 1927, ch. 188, sec. 1 (a); but, by an amendment made in 1929, by 19 Geo. V. ch. 23, sec. 10, “judge of the . . . court” was changed to “judge of a . . . court.”

Upon motion by M. for an order prohibiting the Judge of the District Court of the District of Nipissing from inquiring whether M. was the father of such a child, upon the ground that neither M. nor the mother of the child resided in the District of Nipissing, and that she alleged that the acts of sexual intercourse took place in another district:

Held, that the substitution of “a” for “the” had the effect of conferring jurisdiction upon a judge of any county or district court in Ontario; and the motion was dismissed.

The words of a statute, if precise and unambiguous, must be interpreted in their natural and ordinary sense; and the words of a statute conferring a new jurisdiction must be clear and unambiguous: *James v. South Western Railway Co.* (1872), L.R. 7 Ex. 287, 296.

MOTION by Herman Moyer for an order prohibiting his Honour Joseph A. Valin, Judge of the District Court of the District of Nipissing, from inquiring and determining whether the applicant is in fact the father of a child of Ethel Grawbarger—a child born out of wedlock.

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The motion was heard by LOGIE, J., in Chambers.

M. H. Ludwig, K.C., for the applicant.

Murray Gordon, for Ethel Grawbarger, the respondent.

December 12. LOGIE, J.:—Ethel Grawbarger, who alleges that Herman Moyer is the father of her child born out of wedlock, has taken out an appointment before his Honour Judge Joseph A. Valin, Judge of the District Court of the District of Nipissing, to inquire and determine whether Moyer is in fact the father of such child. The jurisdiction of Judge Valin is questioned by Herman Moyer on the grounds (a) that the said Ethel Grawbarger and the said Herman Moyer are both residents of the District of Parry Sound, and are not and never have been residents of the District of Nipissing, and (b) that the relations which the said Ethel Grawbarger alleges that the said Herman Moyer had with her, and which she alleges resulted in the birth of the said child, were had in the Township of Powassan, in the District of Parry Sound, and not in the District of Nipissing; and he moves for prohibition.

This necessitates the interpretation of clause (a) of sec. 1 of the Children of Unmarried Parents Act, R.S.O. 1927, ch. 188, as amended by (1929) 19 Geo. V. ch. 23, sec. 10.

It is a cardinal rule in the interpretation of statutes that, if the words of the statute are in themselves precise and unambiguous, no more is necessary than to expound these words in their natural and ordinary sense, the words themselves in such case best declaring the intention of the Legislature. If there is nothing to modify, nothing to alter, nothing to qualify, the language which the statute contains, it must be construed in accordance with the ordinary and natural meaning of the words and sentences.

It has been said, with regard to statutes creating new jurisdiction, that the words conferring such a jurisdiction must be clear and unambiguous: *James v. South Western Railway Co.* (1872), L.R. 7 Ex. 287, 296; and, although the *James* case was not a case of territorial jurisdiction, this principle is, I think, particularly applicable where the court is a creature of the statute

Logie, J. and of limited jurisdiction, possessing no common law authority, but on the contrary an authority defined and restricted by the Act to which it owes its existence. The Children of Unmarried Parents Act constitutes such a court, a court intended for the relief of an unmarried mother to the intent that the father of the illegitimate child, *inter alia*, should pay certain reasonable expenses of the mother, and a weekly sum, or a lump sum, towards the maintenance of the child.

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This social legislation was originally very much weaker, and going back only as far as the Revised Statutes of Ontario 1914, the Act then in force was ch. 154, called the Illegitimate Children's Act, which provided for the liability of the father for necessaries supplied to the illegitimate child under certain conditions. This limitation of liability was felt insufficient, and the first Children of Unmarried Parents Act, passed in 1921, 11 Geo. V. ch. 54, repealed the Illegitimate Children's Act of 1914, and constituted a statutory court which had jurisdiction, among other things, to make the orders I have referred to. In my opinion, the Act is clear and unambiguous. There is no requirement in the Act as to the place of trial, either with reference to the residence of the parties or the commission of the act of sexual intercourse. Nor is there any territorial jurisdiction in express terms set forth in the Act, but effect must, of course, be given to the intention, where the Act, without conferring jurisdiction in express terms, does so by plain and necessary implication: *Cullen v. Trimble* (1872), L.R. 7 Q.B. 416; *Johnson v. Colam* (1875), L.R. 10 Q.B. 544; *Regina v. Justices of Worcestershire* (1854), 23 L.J. M.C. 113.

Under the Act of 1914 the cost of necessaries might be recovered in an action for the value thereof against the father of the child, in any court of competent jurisdiction, and this action usually was brought in a Division Court, because as a rule the amounts were small and within that jurisdiction, but by the Act of 1921 the jurisdiction was conferred by secs. 13 and 18 upon the "Judge." The interpretation of the word "Judge" in that Act, sec. 3(a), is as follows:—

(a) "Judge" shall mean judge, or junior or acting judge of the county or district court and shall include a police magistrate and a judge of the juvenile court where such police magistrate or judge of the juvenile court has been designated by the Lieutenant-Governor in Council a judge within the meaning of this Act.

The same interpretation was carried into the Children of Unmarried Parents Act, R.S.O. 1927, ch. 188, sec. 1, clause (a).

This however was amended in 1929 by 19 Geo. V. ch. 23, sec. 10, as follows:—

10. The clause lettered *a* in section 1 of the Children of Unmarried Parents Act is amended by striking out all the words at the commencement thereof down to and including the word "court" in the second line, and inserting in lieu thereof the words "‘Judge’ shall mean a judge or junior or acting judge of *a* county or district court."

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Now that description is not the same description as in the Acts of 1921 and 1927, because in those Acts the word "Judge" was interpreted as meaning judge or junior or acting judge of "*the*" county or district court, etc., whereas by the amendment of 1929 "Judge" shall mean judge or junior or acting judge of "*a*" county or district court. If the interpretation of the meaning of the word "Judge" had remained "judge . . . of *the* county or district court," it might be argued that the word "*the*" was a definite article or a demonstrative word used before a noun to particularise its meaning, having a force thus distinguished from the indefinite, distributive force of "*a*." Thus it might be said that "Judge of the County Court" points to a particular judge of a particular court as distinguished from judge of "*a*" County Court. But the Legislature introduced the indefinite article "*a*" by sec. 10 of the Act of 1929 before the word "county," and the introduction of this indefinite article, to my mind, opens up to all judges, junior or acting judges, of any county or district court in Ontario jurisdiction to hear and determine the matters which they are by the Act empowered to hear and determine.

Mr. Ludwig stresses the unfairness of bringing a man, say, from Powassan to Sarnia to answer a charge before a Judge of the County of Lambton, assuming that the complainant had moved there, but is this hardship any greater than compelling a complainant to go from Sarnia to Parry Sound in search of her rights, assuming, say, that both parties had lived in Sarnia and the accused had moved to Powassan? There is nothing in the Act to allow for the convenience of the parties as to the place of trial or for changing the venue, but on the material the convenience is very much in favour of North Bay. Moreover, if the complainant is compelled to go to Parry Sound, the Judge of the District of Parry Sound has expressed his disinclination to hear the matter, because of interest, and he says, so far as convenience goes, that Parry Sound is an inconvenient place at this time of year for the trial. Witnesses from Powassan would require to be absent at least three days, and he suggests, if there are any good reasons why

Logie, J. this case should not be heard at North Bay, that it might be taken before Judge Mahaffey at Bracebridge. These reasons are, to my mind, insufficient if the statute requires the matter to be heard at Parry Sound. I merely mention them because they were brought up on the material.

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MOYER. I am of opinion that Judge Valin is a "judge of a district court" before whom this matter may properly be heard.

In conclusion I am of opinion that the intention of the Legislature in striking out the definite article "the" and substituting the indefinite article "a" was to make the Act more workable and in ease of a complainant.

The motion for prohibition is dismissed with costs.

[APPELLATE DIVISION.]

1929.

MCKEE v. FISHER.

Dec. 18.

Sale of Goods—Auction Sale of Cattle—Terms Cash or Payment by Approved Note — Purchaser Taking Cattle Openly away without Paying or Giving Note—"Owner"—"Wrongful Taking"—Action of Replevin—Replevin Act, R.S.O. 1927, ch. 99, sec. 2—Completed Sale—Sale of Goods Act, R.S.O. 1927, ch. 163, secs. 1, 33, 53—Delay and Negotiations—Demand—Nonsuit—Practice.

The defendant offered for sale at public auction certain cattle, for which the plaintiff bid and was declared the purchaser. The advertised terms of the sale were that for any cattle sold the purchaser was either to pay cash or deliver an endorsed promissory note to be approved of by the plaintiff. The defendant, having a money claim against the plaintiff, and, desiring to make a settlement with him, openly took the stock to his farm without paying cash or giving an approved note; and, the plaintiff said, without his knowledge or consent. An attempt to effect a settlement failed, and the plaintiff then brought this action for replevin. The trial Judge dismissed the action at the close of the plaintiff's case:—

Held, that the plaintiff was not, when he commenced the action, the "owner" of the cattle, and there was not a wrongful taking, within the meaning of sec. 2 of the Replevin Act.

The moment the cattle were knocked down to the defendant by the auctioneer a completed sale was made, and the property in the cattle passed to the defendant: Sale of Goods Act, secs. 1 (g) and (k), 38 (1) (a), 56 (b).

The judgment dismissing the action was, therefore, affirmed (RIMDELL, J.A., dissenting).

Per RIDDELL, J.A.:—Whatever might have been the case had the cattle been removed with permission, there was no justification in law for the defendant, without permission, taking possession of the cattle and removing them without complying with the terms of the sale.

The negotiation between the parties for a settlement resulted in the drawing up of a note for the amount of the purchase, and the defendant taking it away, promising to bring it to the plaintiff, prop-

erly signed, in a few days, but the promise was not fulfilled. This agreement was a waiver *pro tanto* of the conversion, but it was conditioned upon the defendant bringing a satisfactory note within a few days. This he did not do; thereafter his possession of the cattle was wrongful; and no demand on the part of the plaintiff was necessary.

When the defendant moves for a "nonsuit," he is not, according to the established practice, permitted to have a new trial or to adduce evidence before the appellate court.

An appeal by the plaintiff from the judgment of the County Court of the County of Dufferin (MOORE, Co. C.J.) dismissing the action, which was brought under the Replevin Act to recover possession of certain cattle sold by the plaintiff to the defendant at an auction sale.

The judgment also dismissed the defendant's counterclaim without costs, but there was no appeal as to the counterclaim.

October 8. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

A. R. Hassard, for the appellant, argued that there should not have been a "nonsuit," as the plaintiff had shewn a *primâ facie* case for replevin. The stock was removed by the defendant without permission and without complying with the terms of the sale, and therefore wrongfully. In these circumstances, no demand on the part of the plaintiff was necessary, he having the right to replevy the goods under the Replevin Act, R.S.O. 1927, ch. 99, sec. 2. The learned trial Judge erred in "nonsuiting" the plaintiff, because the evidence at the trial shewed that, as pleaded in the alternative, the defendant was indebted to the plaintiff for the price of the goods, \$161.50, and the learned Judge should have tried out that issue.

R. David Evans, for the defendant, respondent, contended that neither the taking of the cattle nor their detention was wrongful, and so there could be no replevin: *Baker v. Fisher* (1890), 19 O.R. 650. The transaction came under the Sale of Goods Act, R.S.O. 1927, ch. 163; as soon as the auctioneer's hammer fell, the sale was complete, and the property in the cattle passed to the defendant. Only a lien remained in the plaintiff, and this he lost by waiver through subsequent negotiations with the defendant.

December 18. FISHER, J.A.:—The plaintiff appeals from the judgment of the Judge of the County Court of the County of Dufferin in an action of replevin. Short'y the facts are as follows. The plaintiff had a public auction sale, and at that sale the defendant purchased certain farm stock to the value of \$161.50. The terms of the sale as advertised were that for any stock sold

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1929. approved of by the plaintiff. Prior to the sale the defendant inter-
viewed the plaintiff and wanted him to agree that for any stock

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Fisher, J.A. he might purchase the plaintiff would allow on the purchase the amount of some debt which the defendant alleged was owing to him by the plaintiff. This was not agreed to. After the defendant made his purchase, he took the stock to his farm without paying cash or giving an approved note, and, the plaintiff states, without his knowledge and consent. Thereafter an attempt was made by both parties to effect a settlement, which failed, and this action of replevin followed.

At the close of the plaintiff's case, on the defendant's motion for a nonsuit, the trial Judge, being of the opinion that, as the defendant had purchased the stock, he had the right to remove it to a place of his own choosing and for his own purposes, held that there was not a "wrongful taking" within the meaning of the Replevin Act, R.S.O. 1927, ch. 99, and dismissed the action.

Section 2 of the Replevin Act provides that where goods, etc., "have been wrongfully distrained or have been otherwise wrongfully taken or detained, the owner . . . may bring an action of replevin for the recovery thereof."

It will be observed that under this section it is only an "owner" or "other person capable of maintaining an action for damages" who is entitled to bring an action for replevin, and the point for determination on this appeal is, was the plaintiff an owner of the cattle when he commenced this action? It seems to me that this transaction must be considered as a sale of goods within the meaning of the Sale of Goods Act, R.S.O. 1927, ch. 163. "Goods" under this Act is interpreted as including "all chattels personal other than things in action and money," etc.: see sec. 1 (g); and "Sale" shall include a bargain and sale as well as a sale and delivery: sec. 1 (k). Section 56 (b) provides that "a sale is complete when the auctioneer announces its completion by the fall of a hammer or in any other customary manner." I therefore think that the moment the cattle in question were knocked down by the auctioneer to the defendant a complete sale was made and the property in the stock passed to him, and all that remained to the plaintiff was a lien entitling him to possession until the cash was paid or an approved note was given—see sec. 38 (1) (a) and *Payne v. Cave* (1789), 3 T.R. 148, and *Mainprice v. Westley* (1865), 6 B. & S. 420.

In the present case there were no written conditions of sale, the terms being cash or credit, the terms of credit were not specified, and there was no mention that anything purchased was not

to be removed until cash was paid or an approved note delivered. During the evening following the sale the defendant removed the stock, to use the words of the trial Judge, "to a place of his own choosing," and, so far as the evidence discloses, in full view of the plaintiff or any one acting for him, including the auctioneer, so that it is beside the question to argue or to hold that the removal was a surreptitious one, and no one suggests that the cattle were stolen. It is clear that the defendant intended to give a note for whatever amount he thought he was indebted to the plaintiff; and, as the terms of any note to be given were not made known before the sale, he was entitled to negotiate with the plaintiff as to the period of time for which the note was to be given, and also as to the acceptance of the person he intended to offer as an endorser. In all these circumstances, a completed sale having been made—and, as stated, there being no conditions against removal—it is difficult to understand why the defendant had not a perfect right to remove the cattle. It may be that the plaintiff intended that there should be no removal until either cash was paid or an approved note given, and, if he did, he should have so provided before a sale was made, because he has no right after the sale to ask for nor has the Court the right to impose new terms. What took place between the plaintiff and the defendant after the removal will be better understood by a reference to the following evidence given by the plaintiff:—

"Q. Was settlement made by all the purchasers immediately after the sale? A. Yes, all but the one—that is Fisher.

"Q. He did not settle? A. No.

"Q. Was he asked to settle? A. Well, I think Bob Armstrong mentioned it to him.

"His Honour: Did you ask him? A. No, I did not ask him myself.

"Q. You were not looking after the books as clerk? A. No.

"Q. You weren't handling the money either, were you? A. No.

"Q. Did Mr. Fisher settle that evening? A. No.

"Q. Did he take the articles away? A. Yes.

"Q. You had a conversation with Mr. Fisher that night. What did it amount to? A. Well, he asked me if I would take a note for \$100.

"Q. After this sale, Mr. Fisher took away the articles that he bought and he didn't make any settlement that night? A. No.

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"His Honour: What is your answer to the question 'Fisher took away the articles he bought?' A. Yes, he took them away.

"Q. Any reason advanced that night why they weren't settled for? A. Well, no; he said he would see me in a few days and settle for them.

"Q. What relation is the defendant to you? A. He is a brother-in-law.

"Q. You had trusted him heretofore in dealings? A. Yes.

"Q. Why did you wait and allow him to take away the articles? A. Well, of course, I didn't know he had got them until they were gone.

"Q. What was said at this meeting at George Patton's by the defendant in regard to settlement? A. Well, he wanted me to give him a note and he would give me one and I wouldn't give him a note.

"Q. What did Mr. Fisher say on that occasion? How long was that after the sale? A. It was probably 10 days.

"Q. In the meantime where were the articles and stock? A. They were at Harvey Howes' at that time.

"Q. But first they were not there. Where were they? A. They were at Al. Thompson's.

"Q. How long were they there? A. Well, they must have been there nearly a week, I guess.

"Q. You stated that this meeting at Patton's took place about 10 days after the sale. In the meantime, while the stock was at Al. Thompson's, did you go down there? A. Yes, I was down, but there was nothing said then. I was waiting for a settlement.

"Q. If you had been dealing with a stranger would you have gone sooner for settlement? A. Yes, I would.

"Q. Why did you delay going? A. He said he would settle in a few days.

"Q. Was it because you were brothers-in-law and you thought it would come out all right? A. I thought it would come out all right, yes.

"Q. Anything else? A. He asked me if I would leave it for a few days.

"Q. Wouldn't a normal man, when he is offered such a thing as that, see that the cattle were returned that night? A. When he said he would come back and settle, I believed he would.

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"Q. Ordinarily a man would see that the stuff was brought right back? A. The stuff should never have been lifted.

"Q. It was let go from your place? A. Yes.

"Q. In the ordinary manner? A. I didn't see it go.

"Q. He came back to your place that night? A. Yes.

"Q. And had supper at your place? A. Yes.

"Q. If a man has intended to take stuff wrongfully would he have returned to your place and stayed for supper? A. Well, of course, I thought he would settle.

"Q. When did you first demand the return of this stuff? A. Well, it was after I went to Howes' that time for them.

"Q. Would it be about 10 days later? A. About that.

"His Honour: Later than what? A. Than the sale.

"His Honour: The meeting at Patton's was 10 days later? A. It was right after that—perhaps 12 days.

"His Honour: How many days after the meeting at Patton's? A. It would possibly be a couple of days more.

"Q. All that time there was no action by you to have this stuff returned? A. No, I left it there waiting on a settlement."

From this evidence it seems to me quite clear that, even if the plaintiff had the right to recover possession of the cattle, he waived that right: first, by neglecting for a period of nearly two weeks to take any steps to regain possession; and, secondly, by entering into repeated negotiations with the defendant in which he agreed to extend to him certain credit if a satisfactory note was forthcoming, and also that any lien the plaintiff had as an unpaid vendor was lost. See sec. 41 (b) and (c).

My conclusions therefore are: that there was no surreptitious removal; that there was a completed *sale* to the defendant, and the plaintiff was not an "owner;" that the evidence falls short of establishing an express agreement that the plaintiff should retain the property, or resume possession thereof, nor can one be implied; and that there was not a "wrongful taking" within the meaning of sec. 2 of the Replevin Act.

The appeal fails and must be dismissed with costs.

MASTEN and ORDE, JJ.A., agreed with FISHER, J.A.

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LATCHFORD, C. J.:—This appeal is from the judgment of his Honour J. C. Moore, Judge of the County Court of the County of Dufferin, dated the 2nd April, 1929, dismissing the action with costs, “nonsuiting the plaintiff,” as it is called in the notice of appeal; and, the defendant consenting, dismissing the counter-claim without costs.

The main and only material grounds of appeal are: (2) that the learned Judge erred in nonsuiting the plaintiff, as the plaintiff shewed that a *prima facie* case of replevin had been established; (3) that the learned Judge erred in nonsuiting the plaintiff because the evidence at the trial shewed that, as pleaded at the trial in the alternative, the defendant was indebted to the plaintiff for the price of the goods and chattels, namely, \$161.50, as claimed, and the learned Judge should have tried out that issue.

The action was for the replevin of certain cattle which the defendant had purchased at an auction sale of the plaintiff's effects and had openly removed to his own custody immediately after his purchase.

The Replevin Act, R.S.O. 1927, ch. 99, sec. 2, enlarged on the common law by providing that where goods have been wrongfully taken or detained the owner may bring an action for their recovery and for the damages sustained owing to the taking or detention. Such was indeed the form of the action.

The parties are brothers-in-law and had been joint lessees of a farm. When their goods as lessees were distrained by the landlord, the defendant paid more than his share of the rent owing, and had for that reason a claim for considerable amount against the plaintiff. The relationships of the parties are worthy of consideration in determining the crucial point of the plaintiff's case—whether the defendant had *wrongfully taken or detained* the cattle which he purchased at the sale.

From the best consideration I have been able to give to the evidence and to the findings of the learned trial Judge, I agree in his conclusion that neither the taking of the cattle nor their detention was wrongful. There was undoubtedly a sale of the cattle to the defendant at the auction: Sale of Goods Act, R.S.O. 1927, ch. 163, sec. 1 (k) and sec. 2 (1). The removal of the cattle by the defendant was open and unopposed by those in charge of the sale. Friendly negotiations between the parties regarding the payment followed and were continued for nearly, if not quite, two weeks, during which the cattle, without objection by the plaintiff, continued in the defendant's possession.

As the taking or detention was not wrongful, the action of replevin did not lie.

The second ground of appeal fails for the simple reason that a right of action for damages lies only when the taking or detention was unlawful. Accordingly, I think the appeal should be dismissed with costs.

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RIDDELL, J.A.:—This is an appeal from the judgment of the learned Judge of the County Court of the County of Dufferin, whereby he, on the motion of the defendant, granted "a nonsuit," and dismissed the action. There was on the record a counter-claim, which was dismissed without costs—there being no appeal from that dismissal, little need be said about it.

A mass of evidence was produced which had not the slightest bearing upon the issues to be tried; and it is no wonder that the learned County Court Judge, after hearing a great deal of it, refused to hear any more.

The pleadings present the following case—the plaintiff claimed to be the owner of certain live stock, which the defendant wrongfully detained from him; thereupon he took proceedings in replevin, and he now sues accordingly for his stock, for damages for their detention and costs—adding a general claim. The defendant, in addition to claiming the stock, asks damages for the wrongful replevin or in the alternative damages under the replevin bond given to the sheriff on executing the order for replevin. The damages, according to particulars furnished, are for being deprived of the stock.

We have only the evidence adduced by the plaintiff, as the defendant saw fit to rest his rights upon that evidence and did not adduce further evidence. From this testimony it appears (leaving aside irrelevant matters of detail) that the plaintiff was to have a sale of certain personality on the 30th January, 1929, including the stock in question, the terms of sale being, that approved, endorsed notes were to be given for the goods purchased over a certain amount (if not paid for in cash). Some time before the sale, the defendant, who claimed that the plaintiff owed him a considerable sum, tried to get the plaintiff to agree that he, the defendant, might buy goods up to the amount of his alleged claim against the plaintiff; but the plaintiff refused and insisted that the defendant should give notes for anything he bought like any other purchaser. The defendant went to the sale and bid for the stock in question some \$161.50; the clerk was about to

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prepare a note or notes for this sum in the same way as the notes for the other purchasers; but the defendant said that he wanted to see the plaintiff before he settled. He did see the plaintiff, but, before doing so, he removed the stock without the plaintiff's knowledge. On seeing the plaintiff he endeavoured to make an arrangement involving security for his own claim against the plaintiff; but the plaintiff refused, and the defendant went away promising to settle in a few days. The plaintiff waited, but when about 10 days elapsed and the defendant had not delivered the note, he went for the stock or a settlement. He saw him, on the 8th February, at the house of a relative, Patton; and considerable conversation took place, the defendant asking for a note from the plaintiff for the amount he claimed the plaintiff owed him, and the plaintiff consistently refusing. In the long run, the plaintiff insisting upon a settlement, a note was drawn up for the amount of the purchase, and the defendant took it away, promising to bring it to the plaintiff, properly signed, in a few days. This promise was not fulfilled, and the plaintiff, after a reasonable time, took replevin proceedings.

The learned County Court Judge said:—

“From the evidence it seems quite apparent that there was an open public sale by the plaintiff to the defendant of the chattels in question, and that the defendant immediately took possession of them, exercised dominion over them, and removed them to a place of his own choosing for his own purposes. There can be no question, therefore, but that the taking of the goods in the first place was a rightful taking, certainly in the sense that it is opposed to the wrongful taking contemplated by the action in replevin.”

It seems to me that the learned Judge has fallen into a fundamental error. Whatever might have been the case had the stock been removed with permission, there can be no justification in law for the defendant, without the permission of the plaintiff, taking possession of the stock and removing them without complying with the terms of the sale.

Of course, the bargaining and agreement on the 8th February was a waiver *pro tanto* of the conversion, but it was clearly conditioned upon the defendant bringing a satisfactory note for his purchase within a few days. This he did not do; and thereafter his possession of the stock was wrongful. No demand was necessary on the part of the plaintiff, the defendant having wrongfully taken away and afterwards wrongfully detained the plaintiff's property.

What might have been found had the defendant seen fit to

adduce evidence, we need not consider; it has long been established practice that, when the defendant moves for a "nonsuit," he is not permitted to have a new trial, or to adduce evidence before the appellate court; it is considered that he has elected to rest his case and his rights upon the evidence already given. It has been the constant practice of some Judges, including myself, to warn the defendant asking for a "nonsuit" of the danger which he runs. I do not suggest that the Court has no power, in a proper case and to avoid injustice being done through inadvertence, to direct that the case be reopened, a new trial had, or such other relief given the defendant as the justice of the case requires. And, had the counterclaim in the present case been for the alleged debt of the plaintiff to the defendant, I should think that the case should be reopened upon proper terms as to costs; but the right of the defendant to sue for and recover the debt if any owed him by the plaintiff is in no way involved in this action, and the disposition made of the issues in this action in no way interferes with him in asserting any rights he may have against the plaintiff.

I would allow the appeal with costs and direct judgment to be entered for the plaintiff with costs.

Appeal dismissed (RIDDLELL, J.A., dissenting).

[APPELLATE DIVISION.]

METCALFE V. GENERAL ACCIDENT ASSURANCE CO. OF CANADA.

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Dec. 18.

Insurance (Fire) — Unoccupied Premises — Statutory Condition 5 (d), R.S.O. 1927, ch. 222, sec. 98—Breach—Evidence—Onus—Finding of Trial Judge—Chattels Insured only while in Building "Occupied as a Dwelling"—Temporary Absence of Occupant—Reasonableness.

The plaintiff was insured by the defendant company against loss by fire of her household furniture contained in a certain house "only while occupied as a dwelling." The policy was subject to the statutory conditions without variation. At the date of the policy, the plaintiff was living in the house, but was not in personal occupation of it, and it was without any occupant, when a fire occurred which destroyed or injured the chattels insured:—

Held, in an action upon the policy, that the onus of establishing a breach of statutory condition 5 (d) was upon the defendant company, and the finding of the trial Judge, that at no time before the fire was the house unoccupied for more than 30 consecutive days, could not, upon the evidence, be interfered with.

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1929. The main defence was that, at the time of the fire, the house was not "occupied as a dwelling;"—

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Held, that the words quoted were used in the policy merely as part of the description of the property insured, and not as a condition or as modifying the statutory conditions; and a mere temporary vacancy or absence of the occupant, reasonable in the circumstances, will not be ground for a finding that the house was not "occupied as a dwelling" when the fire occurred.

Review of the authorities.

Spahr v. North Waterloo Insurance Co. (1899), 31 O.R. 525, discussed. And *held*, upon the facts set out in the judgments, that the plaintiff was, though not on the premises when the fire occurred, yet substantially in occupation of them; and was entitled to recover (Rim-Dell, J.A., *dubitante*).

Sembler, per Orde, J.A., that (apart from authority) when a building is declared to be insured "only while occupied as a dwelling" the insurer is guarding against its occupancy or use for any other purpose, and too much stress has been placed in decided cases, upon the word "occupied." The obligation to remain in continuous occupation in order to keep the insurance alive is inconsistent with the implied permission to leave the place vacant for any period not exceeding 30 consecutive days.

THE following statement is taken from the judgment of MASTEN, J.A.:—

This is an appeal by the defendant company from the judgment of the District Court of the District of Manitoulin, dated the 11th June, 1929, in favour of the plaintiff for the recovery of \$506.90, under an insurance policy issued by the defendant company, for damage done to household goods by fire.

The insurance policy in question is dated the 21st March, 1927, and insures the plaintiff for one year from that date in the sum of \$1,000 against loss by fire of her household furniture, etc., "while contained in the one-storey building built of frame, roofed with composition roofing, and its additions communicating and in contact therewith, *only while occupied as a dwelling*, situate and being lot No. 350 (318) on the west side of Ferguson-avenue, in the town of Capreol, Ontario."

The policy is subject to the statutory conditions without variation. The only condition relevant to the present appeal is No. 5(d) (Insurance Act, R.S.O. 1927, ch. 222, sec. 98), which reads as follows:—

"When the building insured or containing the furniture insured is, to the knowledge of the insured, vacant or unoccupied for more than 30 consecutive days the insurer shall not be liable for loss or damage occurring unless permission is given by the policy or endorsed thereon."

At the date of the policy, the plaintiff, a married woman, was living in the premises with her three children, but was not in per-

sonal occupation of the house at the moment when the fire occurred. On Tuesday night or Wednesday morning, the 14th September, 1927, a fire occurred in these premises and the property insured was destroyed or injured. The plaintiff claims \$486.66, and the amount claimed is not in dispute.

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October 8. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

J. A. Macintosh, K.C., for the appellant company, argued that at the time of the fire the building insured by the defendant company was not occupied as a dwelling, and therefore there was no liability on the part of the company. The words "only while occupied as a dwelling" were not a modification of the statutory condition, but were part of the description of the insured property, and, the description being false, the company was entitled to repudiate liability: *Spahr v. North Waterloo Insurance Co.* (1899), 31 O.R. 525; *Cooper v. Toronto Casualty Insurance Co.* (1928), 62 O.L.R. 311. The learned trial Judge erred in finding that the house was at no time prior to the fire unoccupied for more than 30 consecutive days.

R. W. R. Shearer, for the plaintiff, respondent, contended that the determination of the case depended on a question of fact—was the house occupied as a dwelling at the time of the fire? The evidence shewed that the house was so occupied. The finding of the learned trial Judge on the 30-day occupancy issue was also correct. In the circumstances, the company could not evade liability. Reference to *Ross v. Scottish Union and National Insurance Co.* (1918), 58 Can. S.C.R. 169; Porter's Laws of Insurance, 7th ed., p. 112; *Moffa v. Law Union and Rock Insurance Co.* (1924), 26 O.W.N. 88; *Shackelton v. Sun Fire Office of London (England)* (1884), 55 Mich. 288.

December 18. MASTEN, J.A. (after setting out the facts as above):—At the trial the defendant company, pursuant to notice, moved for leave to amend its statement of defence by setting up that at the time of the fire the house, in which the furniture was, had been vacant or unoccupied for more than 30 consecutive days, without permission for such vacancy or unoccupancy being given.

With regard to this claim it would be sufficient to say that I find no sufficient ground for differing from the finding of fact by the trial Judge that at no time prior to the fire was the dwelling unoccupied for more than a space of 30 consecutive days and his

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consequent refusal to allow the proposed amendment to be made. But I may add, in support of that view, that the onus was, in my opinion, upon the appellant company of establishing the breach of condition 5(d) and that the evidence fails to establish the alleged breach.

The principal ground of defence by the defendant company is that which was originally set up in the statement of defence and is stated in the notice of appeal as follows:—

“That at the time of the alleged destruction by fire, the building insured by the defendant was not occupied as a dwelling, and by reason thereof there was and is no liability on the part of the defendant to the plaintiff to indemnify her for her loss.”

This limitation of liability does not appear in the policy by way of modification of the statutory conditions, but forms part of the description of the property insured as it appears on the face of the policy in the words which I have already quoted; and, as the right of action, if any, arose prior to the amendment of the Insurance Act in 1929, the defendant company is entitled to rely upon the description so appearing on the face of the policy.

It will be convenient to refer to some decisions bearing on this subject before discussing more minutely the particular facts of this case. The question arose and was somewhat fully discussed by the late Chancellor Boyd in the case of *Spahr v. North Waterloo Insurance Co.*, 31 O.R. 525. In that case the policy contained a clause in variation of the statutory provision as follows:—

“If the premises insured become untenanted or vacant and so remain for more than 10 days without notifying the company, etc., the policy will be void.”

It was held that these words were equivalent to “unoccupied.” The Chancellor laid it down (p. 528) that “the condition imports habitual actual residence in the house and the incidental care and supervision arising therefrom in protecting the property insured,” referring in support of that statement to earlier Ontario and Nova Scotia cases as well as to American decisions. As an exception or modification to that general rule he held in the second place as follows:—

“If ‘untenanted’ is read ‘unoccupied’ (as I think it should be) the case is wholly governed by authority, and absence from personal occupation for a short time, say 3 days, would not be fatal under such conditions, as was pointed out in the earliest case in Ontario, *Canada Landed Credit Co. v. Canada Agricultural Insurance Co.* (1870), 17 Gr. 418, 423.”

After reviewing the facts the Chancellor reached the conclusion that the case in question fell under the general rule as above laid down and not under the exception. From this judgment the plaintiff appealed to a Divisional Court composed of Armour, C.J., and Street, J., and the appeal was dismissed (1900), *ib.* 592.

I have examined all the decisions in our own Courts since the *Spahr* case was decided, but I have not observed anything that assists in the determination of the question arising on this appeal.

The exception mentioned by the Chancellor accords with the view entertained by Chief Justice Cooley in the case of *Shackelton v. Sun Fire Office of London (England)*, reported in 55 Mich. 288. The head-note in that case reads as follows:—

"A house occupied by a tenant was insured. The tenant moved out and the landlady at once moved her own things in and began to clean up, meaning to live there herself, but the next day she had to go away for three days' absence. While cleaning the house she did not eat or sleep there, and after a few days she went off again on a business trip. While she was gone the house was burned. Held, that the policy had not become void on the ground that the premises were vacant."

And in the course of his judgment the Chief Justice remarks (p. 291):—

"There is no doubt that if the insured had actually begun living in the house before her departure on business, the temporary absence would not have affected the policy: in contemplation of law, her occupancy of the house would have been continuous. . . . The only question, then, is whether the fact that for the few days she remained at home before starting on the business trip, she did not sleep in the house or take her meals there, should make any difference. Under the circumstances we think not."

"The insured had taken possession of the house, as the jury must have found, for the purpose of permanent occupancy. She had moved in her household furniture and other goods, and was cleaning and doing other work preliminary to living there in person. Nothing, apparently, was wanting to complete personal possession, except that she lodged and took her meals at her father's, a few rods off."

And the Court affirmed the judgment in favour of the insured.

In the case of *Beecher v. Vermont Mutual Fire Insurance Co.* (1916), 90 Vt. 347, the full Court of Vermont State held that the plaintiff was entitled to recover. The head-note in that case is as follows:—

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"A provision in a policy of fire insurance, that it shall be void if the property covered shall be unoccupied for a period of 10 days without the consent of the insurance company, merely suspends the insurance during the unoccupancy, and the policy is revived by a reoccupancy."

At the time of the fire the property was occupied by the insured, but it had twice remained vacant for periods of over 10 days during the time covered by the policy, and no consent to vacancy was endorsed upon the policy.

The interpretation of the term "only while occupied as a dwelling" is a question of law, but whether at the time of the fire the house in question was occupied as a dwelling is a question of fact: *Gash v. Home Insurance Co. of New York* (1910), 153 Ill. App. 31, at p. 33. Naturally on such a question of fact different judges have arrived at different conclusions, and the reported decisions afford little assistance on this part of the question.

The principle to be applied is well stated in Joyce on Insurance, 2nd ed., vol. 4, para. 2225c, as follows:—

"A mere temporary vacancy or absence of the owner, tenant, or occupant, or a temporary period of non-user, which is reasonable in view of the contemplated uses of the property and of all the circumstances, and which is evidenced by some act or acts fairly shewing not only an intent to return but also an intent not to vacate or give up occupancy or use of the premises nor to abandon them for the purposes of their use, will not of itself operate as a breach of a condition as to vacancy or non-occupation."

The decision in the *Spahr* case is not binding on this Court; but, without considering whether the legal rule there expressed ought or ought not to be in any way qualified, I am of opinion that the evidence in this case establishes as a fact that the house in question was occupied by the respondent as a dwelling at the time when the fire occurred, and accordingly I proceed to state the circumstances which lead me to that conclusion of fact.

Down to the latter end of June, 1927, the plaintiff with her three children continuously occupied the house in question as a dwelling. She had been a tenant of this house for 7 years, and owned the furniture which was used by her and her family while living in it. About the latter end of June, 1927, at the time when school closed, she went with her three children to the house of her mother, who also lived in Capreol and kept boarders. During her visit she was helping out in the care of her mother's house. According to the evidence, as I understand it, the visit or removal was of a temporary character, apparently for the period of the school

vacation, and with full intention of returning to reside in the house in question in the September following. The household furniture was left in the house and the family dog on the premises, whether as a guardian or otherwise does not appear. The plaintiff took away only a change of clothing and otherwise removed nothing from the house. On p. 4 of the evidence, question 100, she was asked:—

"How often would you go to this house during the time you were staying at your mother's? A. Every other day."

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On such occasions she opened the house and aired it out, watered the flowers, and fed the dog. She also slept there with her children from time to time during this period. She is uncertain just on how many occasions she was there to sleep, but swore positively to at least 3 or 4 different occasions, and she adds that she was there 3 or 5 nights to sleep and stayed 2 or 3 days at a time. She also deposes that during the week before the fire she with her children occupied the house for 2 days and 2 nights. During the 2 days immediately preceding the fire, which occurred on Tuesday night or Wednesday morning, she was in the house all day (Monday and Tuesday) cleaning up preparatory to repainting the floors for the purpose of returning to continuous occupation.

The words "only while occupied as a dwelling" cannot, I think, be interpreted with absolute and literal strictness; if personal and constant occupation of the house by the assured is required, the insurance lapsed, *pro tem.* at least, every time the respondent stepped for one moment outside of her house, for during that moment she would not be in personal, physical occupation of the house as a dwelling.

Some intermittency in personal physical occupation must necessarily have been in the contemplation of the parties. The insurance company cannot have contemplated that the plaintiff must remain constantly immured in her house under penalty of losing her insurance.

If the company intended to insist on absolute continuous and uninterrupted personal occupancy, it was essential that it should have so provided in its policy. But, if such a provision clearly appeared, the company would not be able to sell insurance except by misrepresentation.

As the evidence presents itself to my mind, this case falls, as I have said, within the exception mentioned by the Chancellor, namely, that her non-occupancy was of a temporary character such as must have been in the contemplation of both parties at the time when the policy issued. It was the plaintiff's dwelling; had been so

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for 7 years; still was the only dwelling she had. There was no intention of abandoning it as her permanent dwelling. She was on the very day of the fire engaged all day washing the floors to improve it for use as her dwelling. Not only was it her dwelling, but she was occupying it continuously with all her household goods (although that of itself would not be sufficient), and she was also occupying it personally, not continuously it is true, but intermittently, habitually visiting it every other day, tending the house and airing it while she tended the flowers and fed the dog.

Further, whatever might have been the situation if the fire had occurred in an earlier period of her visit to her mother, it appears to me that she adequately reoccupied the house in the week immediately preceding the fire and resumed actual residence therein. Even though the insurance may have been suspended during an earlier period of non-occupancy, it then became revived, and her absence after the time when she re-occupied the house for two days and two nights with her children in the week prior to the fire was of such temporary character as fails to render the policy void.

These reasons accord with the findings of fact by the trial Judge, which, in my opinion, ought to be maintained and the appeal dismissed with costs.

LATCHFORD, C.J., and FISHER, J.A., agreed with MASTEN.
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ORDE, J.A.:—I agree with my brother Masten that this appeal falls to be determined upon the effect of the description of the subject-matter of the insurance as applied to the facts and not upon any alleged breach of the 5th statutory condition as to vacancy. There was, in my opinion, a sufficient resumption of occupancy a few days prior to the fire to constitute a break in the period of vacancy and consequently a new starting point for any future vacancy. The premises therefore had not been vacant for more than 30 consecutive days and the statutory condition has no application.

The other question is one of some difficulty. It arises by reason of the judgments in *London Assurance Corporation v. Great Northern Transit Co.* (1899), 29 Can. S.C.R. 577, *Ross v. Scottish Union and National Insurance Co.*, 58 Can. S.C.R. 169, and *Cooper v. Toronto Casualty Insurance Co.*, 62 O.L.R. 311, which established or confirmed the principle that words added to the description of the thing insured, indicating that it was to be insured only while used for some defined purpose, were themselves

words descriptive of the thing insured, so that, if when the loss occurred it was not so used, the insurance did not attach.

Were it not for the case of *Spahr v. North Waterloo Insurance Co.*, 31 O.R. 525, and for some things said in the judgments of the Supreme Court of Canada in the *Ross* case, I should have said that when a building is declared to be insured "only while occupied as a dwelling" what the insurer is guarding against is its occupancy or use for any purpose other than a residential one, and that the Courts have been laying too much stress upon the word "occupied." And this view is strengthened by the presence of the 5th condition as to 30 days' vacancy. The obligation to remain in continuous occupation in order to keep the insurance alive seems in the very teeth of the implied permission to leave the place vacant for any period not exceeding 30 consecutive days.

The *Spahr* case is not wholly applicable here. It turned upon the scope of a variation of the statutory condition, but it is important in determining the meaning of the word "occupied." In the *London Assurance* case, the thing insured was a steamship and the case is of no assistance in determining what constitutes occupancy. In the *Ross* case, the building insured, though intended to be used as a dwelling house, had not yet been dwelt in by any one when the fire occurred. In the *Cooper* case, the tenant had left the house, and the owner, finding the place vacant, boarded up the windows.

Now it is quite clear that in the *Ross* and *Cooper* cases there was no occupation whatever of the buildings except the constructive and technical occupation of the owners, which is admittedly not occupancy as meant in a policy of insurance.

The present case is quite different. The plaintiff with her family had gone to spend the summer months with her mother. Possibly more than 30 days' continuous absence from the house might have constituted vacancy within the 5th condition. But in a very real sense during all that period she continued to occupy the house, and she certainly occupied it for no other purpose than a dwelling house. She was frequently about the place, entering the house and using it and the furniture for the purposes to which a dwelling house is usually devoted. A few days before the fire she and her children slept and remained in and about the house for two days and two nights.

Under these circumstances, how is it possible to regard the fact that she and the family were not in the house at the time of the fire as constituting non-occupation, if, as is I think clear from the authorities, mere temporary absence is not to be so

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regarded? The question to be determined here is, in my judgment, simply one of fact, and I think that, having regard to the whole succession of events during the period in question, it would not be proper to hold that the house was not at the time of the fire occupied as a dwelling.

The appeal ought therefore to be dismissed.

RIDDELL, J.A.:—While I have great doubt as to the distinction between the present and other cases in which the insurance company was relieved, I do not feel so confident in the matter as to dissent from the unanimous judgment of my learned brethren.

Appeal dismissed.

[APPELLATE DIVISION.]

ROYAL BANK OF CANADA v. HOGG.

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Dec. 18.

Bills of Exchange and Promissory Notes—Series of Renewal Notes for same Debt—Last Renewal by Demand-note—Action upon Earlier Note Payable on Definite Date—Right of Holder to Sue Maker—Suspension of Cause of Action—Demand-note Immediately Enforceable—Suspended Cause of Action also Enforceable—Bills of Exchange Act, sec. 183(2)—Division Court—Garnishment of Credit in Bank—Rights of Claimant.

The plaintiff bank held a series of promissory notes made by the defendant, the earliest dated the 17th January, 1922, and the later ones being merely renewals thereof and representing the same indebtedness. The first and all the subsequent notes, except the last, were payable at a fixed period after date. The last was dated the 10th May, 1926, and was payable on demand at the branch of the plaintiff bank at which the note was held. The bank brought this action in a Division Court upon one of the earlier notes, that of the 4th April, 1923. The action was dismissed at the trial:—

Held, upon appeal, that the taking of a renewal note, where the original note is retained by the holder, does not of itself discharge the indebtedness represented by the original note, but merely suspends the right of action thereon during the currency of the renewal.

Held, also, that a promissory note payable on demand is a present debt and is payable without any demand: Bills of Exchange Act, R.S.C. 1927, ch. 16, sec. 183(2), embodying the law stated in *Rumball v. Ball* (1711), 10 Mod. 38, and *Norton v. Ellam* (1837), 2 M. & W. 461.

And, the renewal demand-note being immediately enforceable against the maker, the original cause of action was also immediately enforceable; and the plaintiff bank was entitled to recover.

Per RIDDELL, J.A.:—The plaint in the Division Court being a garnishing one, the garnishee being another bank, the evidence as to the actual owner of the credit in that bank was not satisfactory; if the defendant's wife desired to claim it, she should be allowed an opportunity of doing so on payment of costs. While a bank, in ordinary circumstances, need not consider any one, in respect of a deposit, except the depositor, still, if it turns out that the money belongs to some other person, that person will be entitled to it unless the bank has so dealt with the account as to have altered its position: *Admiralty Commissioners v. National Provincial and Union Bank of England Ltd.* (1922), 38 Times L.R. 492; and other cases.

AN appeal by the primary creditor in a Division Court action from the judgment of the First Division Court of the County of Prince Edward finding that the appellant had no cause of action against the primary debtor upon the promissory note for \$480 sued upon, and dismissing the action, which was brought to recover \$400 and interest only, the primary creditor abandoning the excess in order to bring the action within the Division Court jurisdiction.

October 9. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, J.J.A.

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R. L. Kellock and R. E. Nourse, for the appellant, argued that, as the subsequent notes were renewals, they were given as conditional payment of original indebtedness: *Ex p. Barclay* (1802), 7 Ves. 597; Chitty on Bills of Exchange, 11th ed., p. 134; Falconbridge on Banking and Bills of Exchange, 4th ed., p. 777. Any one of a series of renewal notes may be sued on, provided all are at maturity: *Bank of British North America v. Hart* (1912), 2 D.L.R. 810; *Baldwin Iron and Steel Works Ltd. v. Dominion Carbide Co.* (1903), 2 O.W.R. 6; *Blackley v. Kenney (No. 2)* (1891), 29 Can. L.J. 108, 18 A.R. 135. A demand-note is due immediately it is given. No demand is necessary: 8 Corpus Juris, p. 406; *Brown v. Barden* (1898), Q.R. 13 S.C. 151; *In re J. Brown's Estate*, [1893] 2 Ch. 300; *Bradford Old Bank Ltd. v. Sutcliffe*, [1918] 2 K.B. 833, at p. 840; *Northern Crown Bank v. International Electric Co.* (1911), 24 O.L.R. 57. Even though a demand were necessary, as the note was payable at the appellant's bank, it was presented for payment: sec. 183 of the Bills of Exchange Act, R.S.C. 1927, ch. 16; *Merchants Bank of Canada v. Henderson* (1897), 28 O.R. 360.

M. L. Gordon, K.C., for the primary debtor, respondent, contended that there must be presentment for payment in order to bring a demand-note to maturity; and, as there was no presentment for payment in this case, the appellant was not at liberty to sue on an earlier note while the demand-note was still current. It was only for the purpose of determining whether an action could be brought without demand, that the rule was made that a demand-note was due at any time after its delivery, for the issue of the writ amounted to a demand. Reference to Falconbridge on Banking and Bills of Exchange, 4th ed., p. 893.

The garnishee, the Bank of Montreal, was not represented.

December 18. RIDDELL, J.A.:—This case seems to me to be a very simple one: as between primary creditor and primary debtor, there is no dispute as to the facts, and the law has been well settled.

In 1923, the defendant, Hogg, gave his promissory note for \$480 and interest to the plaintiff bank: this was renewed from time to time till, at length, a demand-note was given, on the 10th May, 1926, for \$520.65, the amount then due. No formal demand was made for the payment of this note. On the 24th April, 1929, proceedings were taken in the First Division Court of the County of Prince Edward upon the first note, which, on its face, fell due on the 1st July, 1923. In order to bring the claim within the jurisdiction of the Division Court, the excess over \$400 was expressly abandoned.

For some reason, which I am unable to understand, but which was explained to us as based upon want of demand before action, his Honour says: "I am unable to find any authority which gives the primary creditor the right to recover on the note in question."

It is elementary law—contrary to the popular idea—that renewing a note, the original note not being given up or destroyed, does not make the original note void, but simply suspends its operation and makes it non-enforceable during the currency of the renewal note. And so in this case the original note was kept alive, but its effect suspended on each renewal, until the maturity of the renewal note taken.

Then, coming down to the note on demand, while no formal demand was made, it has been law certainly for nearly a century, since *Norton v. Ellam* (1837), 2 M. & W. 461, and probably for centuries before, that a promissory note on demand is due as soon as it is delivered.

It was strongly argued by the primary debtor that it was only for the purpose of determining whether an action could be brought without demand that the rule was established that a demand-note was due at all times after its delivery, as the institution of an action was considered equivalent to a formal demand; but such cases as *Norton v. Ellam*, 2 M. & W. 461, *In re J. Brown's Estate*, [1893] 2 Ch. at p. 304, *Edwards v. Walters*, [1896] 2 Ch. 157, at p. 162, *Boulton v. Langmuir* (1897), 24 A.R. 618, at p. 622, shew that a demand-note matures for all purposes as soon as it is delivered: consequently, this demand-note had matured and was due before action begun, and the original note could be sued on.

The Statutes of Limitations do not therefore bar the primary creditor. We are not concerned with his reasons for proceeding upon the original note rather than on the latest or any intervening note.

The defence based upon the contention that the debt was paid by the assignment of certain land or an interest therein is contradicted by the evidence of the primary debtor himself, and we need not further consider it.

Judgment must, in any case, be entered against him for the amount sued for and costs here and below.

The matter of garnishment is on a different basis: I am not satisfied on this evidence as to the actual owner of the credit in the Bank of Montreal; *prima facie* it is the primary debtor: but, if his wife is desirous of confirming her claim to it, she may—technically, the primary debtor may—have an opportunity of doing so on paying the costs in the court below and of this appeal—she—or he—should exercise this option within 10 days. This

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is on the principle that, while a bank, under ordinary circumstances, need not consider any one, in respect of a deposit, except the depositor, still, if it turns out that the money really belongs to some one else, that person will be entitled to it unless the bank has in some way dealt with the account so as to have altered its position: *Admiralty Commissioners v. National Provincial and Union Bank of England Ltd.* (1922), 38 Times L.R. 492; and cf. *Kleinwort Sons & Co. v. Dunlop Rubber Co.* (1907), 23 Times L.R. 696; *Kerrison v. Glyn Mills Currie & Co.* (1911), 81 L.J.K.B. 465.

ORDE, J.A.:—The Royal Bank, the primary creditor, brought this action in a Division Court rather than a higher Court, presumably because of the facilities there afforded for attaching moneys in the hands of the garnishee before judgment. To bring the case within the Division Court jurisdiction, the primary creditor had to abandon all of its claim in respect of principal in excess of \$400, but under the Division Courts Act interest upon the debt sued for might be added without ousting that Court's jurisdiction: R.S.O. 1927, ch. 95, sec. 54, subsec. 1 (d).

The bank held a series of promissory notes made by the primary debtor, Hogg, the earliest being dated the 17th January, 1922, and the later ones all being merely renewals thereof and representing the same indebtedness. The first and all the subsequent notes, except the last, were payable at a fixed period after date. The last was dated the 10th May, 1926, and was payable on demand at the Royal Bank of Canada, Clive, Alberta, that being in fact the branch of the bank at which the note was held.

The bank brought action upon one of the earlier notes, that of the 4th April, 1923, for \$480, which, with interest payable thereunder, matured on the 4th July, 1923.

It is quite clear of course that the taking of a renewal note, where the original note is retained by the holder, does not of itself discharge the indebtedness represented by the original note, but merely suspends the right of action thereon during the currency of the renewal.

The learned Division Court Judge dismissed the action, holding that the bank had no cause of action against Hogg upon the note sued on. He does not say upon what principle he reaches that conclusion.

The sole question with which we have to deal is the defence that until the maker of the demand-note has been put into default by either a formal or an actual demand for payment thereof the right of action upon the earlier notes still remains suspended.

No formal demand for payment of a demand-note has ever been a preliminary condition of the right to sue the maker. When the note is payable at a particular place, failure to present at that place may entitle the defendant to costs in the discretion of the Court. As against the maker, as was said in *Rumball v. Ball* (1711), 10 Mod. 38, the promise is a promise to pay at any time, and the debt is "plainly precedent to the demand." The later case of *Norton v. Ellam*, 2 M. & W. 461, is to the same effect. Parke, B., says (p. 463) :—

"It is quite clear that a promissory note, payable on demand, is a present debt, and is payable without any demand."

This statement of the law is in effect embodied in subsec. 2 of sec. 183 of the Bills of Exchange Act, R.S.C. 1927, ch. 16.

It is argued that, while it may be the law that a right of action arises against the maker of a demand-note immediately it is executed, without any formal or other demand for payment than the issue of the writ itself, the principle does not extend to the enforcement of some other cause of action which is suspended during the currency of the security given for the same indebtedness.

This argument is, in my opinion, merely playing with words. The giving and taking of a new note for the indebtedness represented by the old one carries with it by necessary implication a suspension of the right to sue upon the earlier cause of action during the currency of the renewal. It would be inconsistent and quite contrary to the implications inherent in the transaction to allow a right of action upon the old note when the time for payment of the same debt had been extended for a fixed period.

I do not think it is an accurate statement of the rule to say that the original right of action is suspended until there has been default in the payment of the renewal note, in the sense that there must be some formal putting of the maker in default by a formal presentation of the note. The suspension is not dependent upon default in any such sense. The original cause of action is always there but the right to enforce it is suspended solely because the debtor has given another security for the same debt which for the time being is unenforceable. Whenever the other security becomes enforceable, then the original cause of action may be enforced. The renewal demand-note being immediately enforceable against the maker, the original cause of action is also immediately enforceable.

This means, in effect, of course, that the giving and taking of a demand-note does not in reality suspend the right of action upon the renewed note at all. But, if it is the law that the maker of a

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The appeal should be allowed with costs and judgment entered for the primary creditor against the primary debtor for the amount claimed and interest and costs, together with the appropriate judgment as against the garnishee.

MASTEN, J.A.:—In this case I agree with my brother Orde that the appeal should be allowed. I agree also in the reasons assigned by him in support of his conclusion, and I find nothing that I can usefully add to what he has said.

LATCHFORD, C.J., and FISHER, J.A., also agreed with ORDE, J.A.

Appeal allowed.

[APPELLATE DIVISION.]

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Dec. 18.

HARWOOD AND COOPER v. WILKINSON.

Illegality—Defence to Action upon Mortgages—Failure to Establish—Absence of Connection between Mortgage-loans and Transactions Said to be Illegal—Evidence—Reversal of Findings of Trial Judge—Refusal of Plaintiff to Answer Questions upon Examination for Discovery—Contempt of Court—Rule 331—Absence of Foundation for Judgment at Trial Dismissing Action—Comment upon Conduct of Counsel.

The judgment of RANEY, J., *ante* 392, was reversed.

Held, that the evidence did not sustain the allegation that the moneys advanced by the plaintiff C. to the defendant for which the mortgages sought to be enforced were made were advanced for an illegal purpose.

The plaintiffs made their case by putting in the mortgages and proving the execution thereof, and it was not necessary for them, nor did they, give any evidence in regard to the transactions which the defendant alleged were illegal and contrary to public policy; and the defendant did not establish any connection between the loans made by C. and those transactions, even assuming them to be illegal.

Held, also, that the refusal of the plaintiff C. to answer certain questions upon his examination for discovery was not a ground for dismissing the action at the trial: the trial Judge had no power under Rule 331 or otherwise to dismiss it upon that ground; Rule 331 contemplates a substantive motion to dismiss the action as a penalty for the plaintiff's refusal to answer proper questions; once the defend-

ant embarks upon the trial, his right to resort to that Rule for a dismissal of the action has gone by the board.

The trial Judge's comment upon the advice not to answer given by the plaintiffs' counsel to C. on his examination for discovery, and upon counsel's appearance at the trial without his clients, was not justified.

These were matters for counsel's own decision. A plaintiff is under no obligation to appear in court to support his case. If it can be established without his presence, neither he nor his counsel is to be censured because of his absence.

AN appeal by the plaintiffs from the judgment of RANEY, J., *ante* 392.

December 2. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, and ORDE, J.J.A.

B. H. Furlong, for the appellants, argued that the plaintiff Cooper was never in contempt of court for refusing to answer questions on examination upon the advice of counsel. At the trial the defendant did not raise any question or suggest that the action should be dismissed on that ground, nor was the matter raised in the pleadings. The learned trial Judge was not justified in criticising the plaintiff Cooper for not answering, or his counsel for not calling him as a witness. Rule 331 gives no power to the trial Judge to dismiss the action on account of questions not being answered as here. The plaintiffs proved their case by producing the mortgages and proving their execution and non-payment. The evidence did not shew that the mortgage transactions were tainted with illegality. There was no evidence to connect the liquor transactions with the loans of money, even if there was any illegality in the liquor transactions. If there was such, then the defendant was *in pari delicto* with the plaintiff Cooper.

F. D. Davis, K.C., for the defendant, respondent, contended that the mortgages were tainted with the illegality of the liquor transactions; that the moneys advanced by Cooper to Wilkinson were advanced for an illegal purpose, and the learned trial Judge was justified in so finding. The learned trial Judge was right in his view of the contempt of court committed by the plaintiff Cooper in refusing to answer questions.

December 18. RIDDELL, J.A.:—This is an appeal from the judgment of Mr. Justice Raney, after the trial at Sandwich, dismissing the action, but without costs.

Admittedly the plaintiff Cooper (the real plaintiff, who will be so called in this judgment, the plaintiff Harwood being but his agent) lent the defendant very substantial sums of money for perfectly legitimate purposes, i.e., to buy a house to live in and to buy hardware wherewith to carry on business; but the learned trial

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Judge has refused to give him judgment for the money so advanced, for two reasons, the one based upon a supposed ground of public policy and the other upon a ground wholly novel and unprecedented.

As the latter in no way depends upon the facts of the transaction between the parties but solely upon the conduct of the plaintiff in the proceedings in the case, it will be convenient to dispose of it first, before considering the facts of the loans.

The plaintiff, being examined for discovery, was advised by his counsel not to answer certain questions, and he did not answer; he did not give evidence at the trial; he was absent in Germany for his health; and, in any case, his counsel could and did make his case without any evidence from him—it is difficult, indeed, to see what evidence he could give which would have been of the very slightest value in the proof of his case. The questions with the omission to answer were put in at the trial by the defendant, and in his judgment the learned Judge says:—

[Quotation from the judgment, *ante* 392, at p. 403, beginning, “There is another aspect of the case” and ending “*Republic of Liberia v. Roye* (1876), 1 App. Cas. 139.”]

This was not raised on the pleadings, as it might and should have been if it was to be relied on as a ground for dismissing the action—Rule 143—the defendant is not, like the plaintiff, held to facts as existing on the *teste* of the writ, but may rely upon anything in existence up to the actual disposition of the case. No amendment of the pleadings was asked for or made, and the trial Judge should not have proceeded on such ground, even if otherwise he should have dismissed the action for this cause. Rule 331 has been in force for many years, but no precedent for this application of it can be found.

The Rule provides as follows:—

“Any person who refuses or neglects to attend at the time and place appointed for his examination, or refuses to be sworn or to answer any question put to him, shall be deemed guilty of a contempt of Court, and proceedings may forthwith be had by attachment. He shall also be liable, if a plaintiff, to have his action dismissed”

This “contempt of Court” is not of the nature of the “contempt of Court” of which the Court takes notice *proprio motu*, such as is found in disrespect of the Court *in facie Curiae*; it is of the kind of “contempt of Court” of which the other side may take advantage if so advised. There is no foundation for saying that the plaintiff, in acting in accordance with his counsel’s advice, “flouted the Court . . . before the examiner.” If he did, then his counsel

was equally guilty and more so; and he should be disciplined by the Law Society—it would alarm the profession if such a rule were laid down. There does not seem to have been even so much as a ruling by the examiner that the questions should be answered—if that could make a difference, as it does not.

If the defendant was not satisfied with the refusal to answer, his course was to move either by way of attachment or otherwise before a Judge, who could decide whether the questions should be answered and order accordingly. If the defendant was satisfied that he was not hurt by the refusal—and it might be that he was in even a better position by reason of it—he would not move; and, if he did not move, the plaintiff would, in my opinion, be perfectly justified in thinking that the defendant was not anxious for the questions to be answered—to represent this position of the plaintiff as contempt of Court is, in my view, carrying the matter too far.

In any case, the plaintiff was entitled to notice of proceedings based on the supposed contempt involved in the refusal: Holmestad's Judicature Act of Ontario, p. 808, and cases cited. The dismissal of the action is only to be ordered in the case of a wilfully disobedient party, not of one who has made a mistake on the advice of counsel or otherwise—and it is done only in the last resort: *Twycross v. Grant*, [1875] W.N. 201, 229; *Fisher v. Hughes* (1877), 25 W.R. 528; *Pike v. Keene* (1876), 35 L.T.R. 341. In general, another opportunity is given to act properly and answer the questions, even after an order has been made and disobeyed: *Denham v. Gooch* (1890), 13 P.R. 344.

The course taken in the case cited by the learned Judge, *Republic of Liberia v. Roye*, 1 App. Cas. 139, is instructive. In May, 1873, Malins, V.-C., made an order that the Republic should file a proper affidavit on production; this was served next month; in April, 1874, on application of the plaintiffs, the time was enlarged for such filing till July, 1874, coupled with an order that on default the bill should be dismissed; affidavits were put in in June; a summons was taken out to consider, etc., which was adjourned till July on the day after the expiration of the time fixed by the April order; before this was returnable, the Republic obtained from the Lords Justices an order (8th July) further postponing the day of filing till the 28th July, but adopting in substance the Vice-Chancellor's order; on the 18th July, an affidavit was filed, which the Chief Clerk (corresponding in this regard to our Master) held insufficient; he filed his certificate to this effect on the 5th August; on the 7th August, the Republic took out a summons to vary this certificate, which resulted in a

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dismissal of the motion on the 17th November; on the same day, notice was given of a motion to discharge this order, which motion was dismissed with costs on the 12th January, 1875. An appeal was then taken to the House of Lords from this dismissal, as well as from the order of the Lords Justices of the 8th July, 1874. In this case, under these facts, Lord O'Hagan was certainly quite justified in saying (p. 147) that there had been "pertinacious disregard" of the original order for production. The other Law Lords seem to have rather thought that it might be that there was doubt that "a proper length of time and proper opportunities had been allowed to the plaintiff Republic to make the discovery" (p. 144), but did not interfere with the judicial discretion exercised. It is quite manifest from the whole of these judgments in Dom. Proc. that the litigant was entitled to notice of proceedings and a reasonable time to comply with any order that might be made.

In this state of the authorities, I think that "a plaintiff who refuses to answer relevant questions . . . on the advice of counsel has . . . just ground of complaint if his action is dismissed" without giving him notice that such a course is to be followed and giving him a reasonable time to obey any order the Court may make. In the present instance, I am of the opinion that the plaintiff in this regard was denied plain, simple justice. What is a party under examination to do, when his counsel advises him that a question is not to be answered? Is he to set himself up as a better judge of the law than the barrister, certified by the Law Society of Upper Canada? We have all heard and most of us have used the maxim, not noticed by Broom, but common and cogent, nevertheless, that a man who is his own lawyer has a fool for a client; and assuredly a layman would be a double fool if he retained a barrister and refused to accept his guidance in a pure question of law. And is he to do this and judge for himself at the peril of having his action dismissed or his defence struck out?

In this connection, in justice to the barrister, I think I should say that, in my view, there is not the slightest ground for the slur cast upon him by the remarks of the learned Judge (64 O.L.R. at p. 398):—

"I think I ought to add in this connection that the advice given by counsel to Cooper not to answer questions on discovery, and counsel's appearance in court to support his client's case without the presence of either of his clients, and with the off-hand explanation that Cooper was in Europe, argued great confidence by counsel in the complaisance of the Court."

Counsel was not asking nor need he ask favours of the Court—

he had no need of complaisance of the Court; he owed no duty to the Court but respect and honesty; he and not the Court was the sole and only judge as to what witnesses to call. While the Court may suggest, it has neither the duty nor the power to call a witness *proprio motu* in a civil case: *In re Enoch and Zaretzky Bock & Co.*, [1910] 1 K.B. 327; although, of course, he may recall one who has been examined: Taylor on Evidence, 11th ed., pp. 1013, 1014. Counsel, not the Judge, is to determine what witnesses he is to call in support of his case; and, while the Judge has the right to comment upon and base his judgment *pro tanto* on the non-production of any witness or witnesses, he has no right to criticise the discretion observed by counsel in so deciding — there may be a score of things that the counsel knows which the Judge cannot know that determine his decision, and he, not the Judge, is *dominus litis*. From an examination of the proceedings, I say with deliberation that I should never have thought of calling the plaintiff in the present case. Counsel for the plaintiff is under no duty to the Court, or to the opposite party, to call his client; he is to be governed solely by the interests of his client in the choice; and he need ask no favours from the Judge or any one else by reason of his determination.

This is wholly irrespective of the question whether the advice of the counsel not to answer questions was sound—into which I do not enter.

It being clear that the judgment cannot be supported on this ground, the other ground must now be investigated. The plaintiff proved his case by putting in the two mortgages upon which the action is brought, and proving their execution; and then rested. The defendant being called upon for his defence, the following facts were made to appear — the evidence is somewhat confused but there seems no doubt of the salient and important facts, as contended for and sworn to for the defence. The plaintiff was engaged in the business of taking intoxicating liquor from Canada into the United States; the defendant, some time in November, 1922, wanted to buy a house, and borrowed \$5,000 from the plaintiff for that purpose, so used it, and in December, 1922, gave a mortgage for the amount, which is the first of the two mortgages sued on in this action. Some time—the date is not certain—the plaintiff came to the defendant, and asked him to allow a certain boat, used in the traffic spoken of, to be registered in his name, saying, "You will need the money to pay off your mortgage—at any rate I will see that you are well paid." In this he was referring, as the defendant knew, to the house mortgage sued upon herein; and the plaintiff added that "in case of any trouble, he

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could always help me out, he could always get me out;" that the boat was to be used in the trade was understood by both parties. Then the defendant acceded to the request, took the registration in his own name, giving a mortgage on the boat to secure the plaintiff. Later, the plaintiff wanted to start the defendant in the hardware business; the defendant expostulated that he had no money to start in business, and the plaintiff said: "The boat will take care of that." Then the plaintiff advanced some \$12,500, and at length took a mortgage for that sum, which is the second mortgage sued on in this action—he also took notes from the defendant and his wife—this mortgage is dated the 7th July, 1926.

The defendant gave, toward the payment of his debt, accounts amounting to \$3,700, asking that credit should be given for the amount upon the first mortgage, but the amount, the defendant says, was applied on the indebtedness generally. Several times, the plaintiff asked the defendant how his business was getting on, but never for payment of the mortgages.

That the defendant expected and was promised that he would receive some share of the profits of the liquor transactions of the boat is likely enough, but there is nowhere any evidence to connect the liquor transactions with the loans of money—the loans had no connection with this trade. No doubt, it may have been the expectation that he might get the defendant to help him by taking the registration of the boat; that induced the plaintiff to lend him the \$5,000 in the first instance; but there is no evidence that anything of the kind was so much as suggested when the loan was made.

No doubt, too, it may have been the friendly feelings caused by the defendant's acquiescence in this scheme that had some effect in inducing the plaintiff to lend him the money for his business, but there is no evidence that it was any part of the arrangement that, in consideration of this advance, the trade in liquor should continue. There is, in short, no connection between the trade and the loans so as to affect the loans with illegality—assuming that this trade is illegal, as to which I express no opinion.

I can find nothing in the evidence which justifies a finding that the loans are, in any way, irrecoverable by reason of being tainted with this much deprecated trade—which, for the purposes of this judgment, I am willing to assume, without deciding, is against public policy and illegal for that reason. Assuming this, however, I cannot see any reason why the plaintiff should not recover.

Moreover, even were there something of substance in the contention of the defendant, "the well-established test, for determin-

ing whether money or property which has been parted with in connection with an illegal transaction can be recovered in a Court of justice, is to ascertain whether the plaintiff, in support of his case, or as part of his cause of action, necessarily relies upon the illegal transaction; if he ‘requires aid from the illegal transaction to establish his case,’ the Court will not entertain his claim.” Broom, Legal Maxims, 9th ed., p. 466, and cases cited, particularly *Collins v. Blantern* (1767), 2 Wils. 341, and see notes on this case in 1 Smith’s Leading Cases, 13th ed., p. 406. Here the plaintiff proves his case by the production and proof of the mortgages, and he requires no help from any other quarter—it is the defendant who calls in the aid of what is contended to be an illegal transaction, and he is *in pari delicto* in this regard. It is not a case in which “one holds the rod, and the other bows to it”—*Smith v. Cuff* (1817), 6 M. & S. 160, 165—nothing in the way of oppression to make the defendant less *in delicto* than the plaintiff. It does not help the defendant to allege that he was deceived into thinking that he would make a profit out of the illegal transaction: *Parkinson v. College of Ambulance Ltd.*, [1925] 2 K.B. 1, at p. 14.

I would allow the appeal and have the appropriate judgment entered for the plaintiffs, with costs here and below.

MASTEN, J.A.:—Where the defence is illegality the plaintiff fails only when he is compelled, in order to make out his case, to disclose its illegal foundation. In the present case the plaintiffs were able to establish their cause of action without disclosing the suggested illegality, if any such existed, and so were entitled to succeed.

With regard to the summary dismissal of the plaintiffs’ action on the trial because the plaintiff Cooper had refused to answer certain questions on his examination for discovery, no such practice has heretofore existed so far as I am aware, and I can find no basis for it in the Rules of Practice. It appears to me that it might lead in some cases to surprise resulting in an unfair trial.

I think the appeal should be allowed with costs.

ORDE, J.A.:—The action is brought to recover the principal and interest under the covenants contained in two mortgages executed by the defendant in favour of the plaintiff Cooper and by him assigned to the plaintiff Harwood. The action was brought by Harwood alone, but, the defendant having set up that Harwood held the assignments as a mere nominee of Cooper, the latter was added as a co-plaintiff. It is immaterial here whether Harwood

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or Cooper really owns the mortgages, as it is not contended that Harwood stands in any higher position than Cooper.

The only substantial defence is that to which the learned trial Judge has given effect, namely, that the moneys were advanced by Cooper to the defendant for an illegal purpose and cannot therefore be recovered.

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With respect, I think the evidence falls far short of establishing the allegations of the defendant. The first advance of \$5,000 was made to enable the defendant to purchase a house, which was done, and a mortgage thereon was given by the defendant to Cooper to secure the loan. It is altogether probable that Cooper was moved to do this by the expectation that he could make use of the defendant in the illegal liquor business in which he, Cooper, was then engaged. But, whatever Cooper's reason or object or motive may have been in making the loan, there is no evidence that the defendant was then aware of the purpose or that the money was being advanced to further it. There is nothing whatever on which to base a finding that there was any illegality in the transaction when the first loan was made.

The learned trial Judge has laid a good deal of stress upon what later took place, when Cooper, in order to induce the defendant to have his liquor-carrying boat registered in the defendant's name and to overcome the defendant's reluctance, suggested that the defendant's share of the profits from the liquor business would enable him to pay off the mortgage. I know of no principle whereby the illegality of one transaction can be made to attach to an entirely distinct transaction in such a way as to destroy its efficacy.

The second mortgage was given more than two years later, to secure moneys advanced by Cooper to the defendant to set him up in the hardware business. Cooper's motive for doing this may have been the desire to do something for the man who had served him in carrying on an illegal business, but there is no evidence of any illegality in the transaction itself, or that the money was advanced either to carry out or complete some previous unlawful bargain or arrangement between the parties, or to further some unlawful purpose then intended by both of them.

Again, I know of no principle which can render this subsequent transaction invalid, merely because of the earlier illegal transaction, or because of Cooper's motive in assisting the defendant.

Another ground for dismissing the action given by the learned trial Judge must be mentioned. Cooper was examined for discovery, and upon the advice of his counsel refused to answer many

of the questions asked him. Cooper was not called as a witness at the trial, either on his own behalf or by the defendant, and apparently was not present during the trial. It does not appear that any steps were taken by the defendant to compel Cooper to re-attend for examination and answer the questions, if relevant, nor was any motion made under Rule 331 to dismiss his action. The learned trial Judge quotes at length from Cooper's examination for discovery and comments severely not only upon Cooper's refusal to answer the questions, and his failure to appear as a witness at the trial, but upon his counsel's appearance in court to support the plaintiffs' case without the presence of either of his clients. And he holds that the action might be dismissed under Rule 331 because of Cooper's refusal to answer proper questions.

This view of the power of the trial Judge to dismiss the action at the trial on any such ground is, in my judgment, quite erroneous. Rule 331 gives no such power. It contemplates a substantive motion by the defendant to dismiss the action as a penalty for the plaintiff's refusal to answer proper questions. Upon the return of such a motion, the question as to the relevancy or propriety of the questions asked is open for argument, and usually before an action is dismissed the plaintiff is given an opportunity to answer such questions as are ruled to be proper. The power to dismiss an action under this Rule is given as a penalty for the contempt. It was not intended that the contempt should be resorted to at the trial as an added ground of defence to the action upon the merits.

It might be that, by reason of the nearness of the date of trial to the time when the examination for discovery was held, a motion to dismiss under Rule 331 might be launched and made returnable before the trial Judge. But the motion would be disposed of as a motion and not otherwise. If the defendant takes no steps to enforce his rights under Rule 331 before the trial, he must be deemed to have been satisfied with the answers given. Once he embarks upon the trial, his right to resort to Rule 331 for a dismissal of the action has gone by the board.

I desire to add a word as to the learned trial Judge's comment upon the advice given by the plaintiffs' counsel to Cooper upon his examination for discovery and his appearance in court without his clients. Those were surely matters for counsel's own decision. A plaintiff is under no obligation to appear in court to support his case. If it can be established without his presence, neither he nor his counsel is to be censured because of his absence. If his evidence is required by the defendant, the latter may sub-

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The appeal must be allowed with costs and judgment entered for the plaintiffs for the principal and interest due upon the two mortgages and for the costs of the action.

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LATCHFORD, C.J., agreed with ORDE, J.A.

Appeal allowed.

[APPELLATE DIVISION.]

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HARPER v. GRIFFITHS.

Division Courts—Trial—Jury Notice—Right of Judge to Dispense with Jury—Division Courts Act, secs. 118, 136(4)—Plaintiff Called as Witness on his own Behalf—Refusal of Judge to Allow other Witnesses to be Called and Dismissal of Action—Erroneous Ruling—Appeal—Costs.

No appeal lies from the direction of the Judge presiding in a Division Court that the action be tried without a jury, notwithstanding that a jury notice had been properly given: *Division Courts Act, R.S.O. 1927, ch. 95, secs. 118, 136(4).*

Where the plaintiff, called as a witness, makes statements which, in the opinion of the trial Judge, put him out of Court, the Judge should not refuse to hear other witnesses on behalf of the plaintiff.

No party to an action is bound by his own evidence; there is nothing in the way of estoppel or anything else preventing him from strengthening his case by other evidence.

In this case, counsel for the plaintiff, when the Judge refused to hear other witnesses, protested to the last; and, in granting a new trial, the Court ordered that the plaintiff's costs of the former trial, including the costs as to the witnesses wrongfully excluded, and the costs of the appeal, should be paid by the defendant.

AN appeal by the plaintiff in an action in the Ninth Division Court of the County of York from the direction of the Judge presiding therein that the action should be tried without a jury, although notice for a jury had been duly given, and from the refusal of the Judge to hear witnesses for the plaintiff other than the plaintiff himself, and from the judgment dismissing the action.

December 5. The appeal was heard by LATCHFORD, C.J., RIDDELL, MASTEN, ORDE, and FISHER, JJ.A.

A. R. Armstrong, for the appellant, argued that the learned Division Court Judge had no right to dispense with the jury: *In re Cowan v. Affie* (1893), 24 O.R. 358. The learned Judge further erred in dismissing the action, a *prima facie* case having

been established, and in refusing to hear the evidence of witnesses present in court, whom counsel for the plaintiff proposed to call on behalf of his clients: *McIver v. Richardson* (1813), 1 M. & S. 557; *Munday v. Asprey* (1880), 13 Ch.D. 855; Halsbury's Laws of England, vol. 13, para. 814.

F. H. Vanstone, for the defendant Littlefair, and *C. C. Calvin*, for the defendant Todo, respondents, contended that dispensing with the jury was in the discretion of the Judge, and that the appellant had put himself out of court by his own evidence, and the learned Judge was right in refusing to hear other witnesses and in nonsuiting the plaintiff.

December 18. The judgment of the Court was read by RIDDELL, J.A.:—This is an appeal from the judgment of the learned Judge in the Ninth Division Court of the County of York.

In this action, the plaintiff had given the notice provided for in the Act, and was therefore entitled, *prima facie*, to a trial by jury; against his protest, the learned Judge determined to try it without a jury, and did so. This action is made one of the grounds of appeal.

The Division Courts Act, R.S.O. 1927, ch. 95, sec. 136 (4), specifically provides that, "when, in the opinion of the judge, the action is one that ought to be tried without a jury, the judge shall have power to direct that the action be taken out of their hands." From the exercise of such a discretion in the Supreme Court we have more than once held that there is no appeal; and in the Division Court there is even less room for doubt, sec. 118 providing for an appeal to this Court only "from the decision of the judge at or after the trial, or upon an application for a new trial," and this appeal coming within neither category.

The other ground is more serious; and, while we allowed the appeal at the argument on this second ground, we thought that owing to the importance of the question and the apparent rapid growth in some courts of the objectionable practice complained of, we should place our views in writing, with the intent to check its further continuance.

Counsel for the plaintiff called as a witness his client, who in his evidence made statements which the learned trial Judge considered put him out of court; thereupon, the Judge refused to hear other witnesses whom the counsel desired to call, and dismissed the action. Counsel for the plaintiff protested to the last, and did not, as happened in the case of *Greenberg v. Cherniak* (not reported), heard by us the same day, acquiesce in the dis-

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Riddell, J.A. I pointed out in *Rex v. Duckworth* (1916), 37 O.L.R. 197, 219, the course which the right to contradict one's own witness had pursued in England; and I do not here cite the cases—the substance, as stated in 4 C.E.D. (Ont.), pp. 687, 688, is: "By the end of the 18th century, the doctrine was clearly laid down that one's own witness could always be contradicted by others and his error shewn, and, with an occasional lapse, this became established law in the early part of the 19th century."

In the practice of the old Court of Chancery in this Province, the plaintiff in a suit for alimony was not permitted to make her case stronger than her own evidence made it; and I have known the Court, since the Judicature Act of 1881, refuse to receive evidence for the plaintiff in such a case produced with the view of making her case stronger than she had made it herself in her evidence; whether this rule is or can be applied under our present practice, I do not need to consider, as the rule never was, so far as I know, extended beyond the case mentioned. I have no hesitation in saying that no party to an action is bound by his own evidence—there is nothing in the way of estoppel or anything else preventing him strengthening his case by other evidence—he is no more bound by his own evidence than he is by the evidence of any other witness.

Consequently, without the consent of the plaintiff, the Judge had no right to refuse to hear his witnesses, and he should not have dismissed the action without hearing all the plaintiff had to adduce; any other course is a plain denial of justice and the practice is to be deprecated.

Something was said during the argument of young counsel hesitating to "stand up to the Judge;" if any counsel feels that he cannot for any reason, whether fear of the Judge—who after all is generally quite harmless—desire for the favour of the Judge, or any other reason, do justice to his client's interests, he should give up his brief and let some more competent barrister perform the duty. If he gives way to fear or sentiment, and fails to insist upon his client's rights, it may happen that, even if the Court, to prevent injustice, exercises its discretion and grants a new trial, his client will suffer in respect of costs.

Fortunately in this case we have no such weak conduct; the counsel for the plaintiff insisted to the last upon his client's right to have a full hearing, and there is no reason why, in granting a new trial, we should withhold costs from the successful party.

I would allow the appeal and direct a new trial, reinstating the jury notice, without, however, interfering with the statutory right of the Judge to dispense with the jury—the defendants to pay forthwith the costs of the former trial, including the costs as to the witnesses wrongfully excluded, and the costs of this appeal.

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Appeal allowed.

[RANEY, J.]

CITY OF BRANTFORD v. IMPERIAL BANK OF CANADA.

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Assessment and Taxes—Seizure of Goods upon Premises of Manufacturer for Arrears of Taxes—Title and Possession in Bank by Virtue of Security under sec. 88 of Bank Act—“Possession,” Meaning of, in Proviso to subsec. 1 of sec. 109 of Assessment Act—Conflicting Provisions of Dominion and Ontario Acts—Prevalence of Dominion Legislation.

A seizure made by the city corporation for arrears of taxes on property in the city owned by an incorporated manufacturing company, the seizure being made pursuant to sec. 109 of the Assessment Act, R.S.O. 1914, ch. 195, did not, it was held, in the circumstances of this case, take priority over the claim of a chartered bank under securities given by the company pursuant to sec. 88 of the Bank Act, R.S.C. 1927, ch. 12.

The situation at the time of the city's seizure was that the bank was in possession of the goods upon the premises, that is in the factory of the company, but not of the land—both the title to and possession of the goods seized were in the bank.

If the word “possession” in the second line of the proviso to subsec. 1 of sec. 109 means possession of the land, there is a conflict between sec. 88 of the Bank Act and sec. 109, subsec. 1 and subsec. 2(4), of the Assessment Act; and, following *Tennant v. Union Bank of Canada*, [1894] A.C. 31, sec. 88 must prevail.

AN issue directed by an order of FISHER, J.A., in Bankruptcy, to be tried, to determine a question of priority between the parties to the issue.

The issue was tried before RANEY, J., without a jury, at Brantford.

W. T. Henderson, K.C., for the plaintiff corporation.

J. W. Bain, K.C., and Everett Bristol, K.C., for the defendant bank.

December 18. RANEY, J.:—The question for determination is whether a seizure made by the Corporation of the City of Brantford for arrears of taxes on property owned by William Paterson

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Limited, pursuant to sec. 109 of the Ontario Assessment Act, takes priority over the claim of the bank under the bank's securities given by the company pursuant to sec. 88 of the Bank Act.

No question is raised as to the city's claim as against the Paterson company, and no question as to the regularity of the bank's securities. There is a question of fact as to whether the bank was in possession of the goods in question and of the Paterson company's premises at the time when the city made its seizure. The other questions are questions of law.

I find the facts to be that, under pressure from the bank, the company suspended business and discharged its workmen on the 30th June, 1926. That day, in the exercise of its rights under the Bank Act, the bank took possession of all the goods of the Paterson company on the company's factory premises in Brantford, and by verbal instructions to Mr. Dunsheath, who was at that time the secretary-treasurer of the company, put him in possession as its agent. An arrangement had been made on the previous day between the bank and the company that the bank would proceed to turn the raw material on hand in the factory into finished product, and Dunsheath was authorised by the bank to superintend this operation.

On the morning of the 6th July, learning that the city was about to distrain for taxes, the bank confirmed Dunsheath's appointment by letter. On the same morning, but subsequently to the receipt by Dunsheath of the letter confirming his receivership for the bank, the city distrained on a part of the goods for taxes.

After Dunsheath was put in possession of the goods by the bank on the 30th June he put a bolt on the front door of the factory premises. The bank had no right to take possession of the land or building, and this action by Dunsheath must be construed not as an attempt to take possession of the premises to the exclusion of the owners, but only as intended to protect the goods of the bank. As a matter of fact the possession of Dunsheath did not exclude the company's officers from the premises, and the company remained, in right and in fact, in possession of the building, within the meaning of the word "possession" as used in sec. 109 of the Ontario Assessment Act, until the company's assignment in bankruptcy, which was made on the afternoon of the 6th July.

The company could, no doubt, after the 30th June have required the bank to remove its goods from the factory building, but that would not have been in the interest either of the company or of the bank.

The situation therefore at the time of the city's seizure for taxes was that the bank was in possession of the goods in question, but not of the land.

Subsection 3 of sec. 88 of the Bank Act, R.S.C. 1927, ch. 12, provides that a bank may lend money to any person engaged in business as a wholesale manufacturer of goods (such as the Paterson company was) upon the security of the goods. By subsec. 5 any such security may be given by the owner of the goods; and, by subsec. 7, the bank by virtue of such security acquires the same rights in respect of the goods "as if it had acquired the same by virtue of a warehouse receipt." Subsection 2 of sec. 86 provides that a warehouse receipt acquired by a bank shall vest in the bank all the title to the goods covered thereby.

So that, on the morning of the 6th July, when the city made its seizure, both the title to and possession of the goods seized by the city were in the bank.

Subsection 7 of sec. 88 protects claims for wages of persons employed by the manufacturer, but says nothing about taxes.

Turning next to the Ontario Assessment Act, R.S.O. 1914, ch. 195, subsec. 1 of sec. 109 provides that the treasurer of the municipality may levy for arrears of taxes which are a lien on the land on any goods on the land where the title in such goods is claimed by assignment from the person taxed:

"Provided that where the person taxed . . . is not in possession, goods and chattels on the land not belonging to the person taxed . . . shall not be subject to seizure . . ."

On my findings as above (subject to the constitutional question to which I shall refer in a moment) the whole question turns on the meaning of this clause. If the "possession" in the above proviso be possession of the goods, then clearly, the bank having been in possession of the goods when the city made its seizure, the city had no right to seize for taxes. But if the "possession" be possession of the land, then the goods, though the property of the bank, having been assigned to it under sec. 88 of the Bank Act, would not be exempt from seizure.

The proviso above quoted is ambiguous, but I incline to the view that it should be interpreted as though it read: "Provided that where the person taxed . . . is not in the possession (of the land), the goods and chattels on the land not belonging to the person taxed . . . shall not be subject to seizure."

If this be the true construction of the proviso, then, on the facts of this case, there is a conflict between sec. 88 of the Bank Act and subsec. 1 of sec. 109 of the Assessment Act.

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A portion of the taxes for which the city levied by distress was in respect of business assessment, which, under sec. 10 of the Assessment Act, are not a lien on the land. Subsection 2 (4) of sec. 109 of the Assessment Act provides that the treasurer of the municipality may levy by distress:

"Upon goods and chattels which at the time of making the assessment were the property and on the premises of the person taxed in respect of business assessment and at the time for collection of taxes are still on the same premises, notwithstanding that such goods and chattels are no longer the property of the person taxed."

On the facts, this subsection also is obviously in conflict with sec. 88 of the Bank Act.

The question therefore remaining for determination is whether sec. 88 of the Dominion Act, or sec. 109 of the Ontario Act, is to prevail. This question is settled adversely to the municipality by a line of authorities of which it is necessary to refer only to *Tennant v. Union Bank of Canada*, [1894] A.C. 31, which decided that:—

"Section 91 (15) of the British North America Act, 1867, gives to the Dominion Parliament power to legislate over every transaction within the legitimate business of a banker, notwithstanding that the exercise of such power interferes with property and civil rights in the Province (see sec. 92 (13)), and confers upon a bank privileges as a lender which the provincial law does not recognise. The legislation of the Dominion Parliament, so long as it strictly relates to the subjects enumerated in sec. 91, is of paramount authority even though it trenches upon the matters assigned to the Provincial Legislature by sec. 92."

The latest cases are: *Royal Bank of Canada v. Larue*, [1928] A.C. 187; *Canadian Credit Men's Trust Association v. Hoffar Ltd.*, [1929] S.C.R. 180; *Silver Brothers Ltd. v. Hart*, [1929] S.C.R. 557.

The issue must be determined in favour of the defendant and with costs.

APPENDIX I.

RULES OF COURT.

At a meeting of the Judges of the Supreme Court of Ontario held at Osgoode Hall on Friday the 20th day of October, 1928:—

It was resolved that the Rules passed on the 20th day of February, 1922, under the provisions of the Criminal Code, should be and the same were thereby rescinded and that the following Rules be enacted in lieu thereof:—

(1) Subject to any direction that may be made by the Judge presiding at any sittings of Assize, and subject to the provisions of the Criminal Code with reference to the provisions of the Criminal Code with reference to exhibits in the case of an appeal being had, forthwith after the close of each sittings of Assize the Clerk of the Assize shall return to the Central Office at Osgoode Hall the indictments in all cases disposed of at the sittings, and shall forthwith transmit all exhibits and other documents in connection with the proceedings at the Assize to the Clerk of the Peace for the County.

(2) When any case is not disposed of but traversed to some other sittings, the Clerk of Assize shall retain the indictments and all other documents and shall have them in Court at the sittings to which the case has been traversed.

(3) When the exhibits cannot conveniently be transmitted to the Clerk of the Peace or are of such a nature that they cannot conveniently be kept by him, the Clerk of Assize shall dispose of them as the presiding Judge may direct.

APPENDIX II.

Ontario cases decided on appeal to the Judicial Committee of the Privy Council and the Supreme Court of Canada and reported since the publication of vol. 63 of the Ontario Law Reports.

CANADIAN PERFORMING RIGHT SOCIETY LTD. v. FAMOUS PLAYERS CANADIAN CORPORATION LTD., 60 O.L.R. 614, affirmed by the Judicial Committee: CANADIAN PERFORMING RIGHT SOCIETY LTD. v. FAMOUS PLAYERS CANADIAN CORPORATION LTD., [1929] A.C. 456.

ERIE BEACH CO. LTD. v. ATTORNEY-GENERAL FOR ONTARIO, 63 O.L.R. 469, affirmed by the Judicial Committee: ERIE BEACH CO. LTD. v. ATTORNEY-GENERAL FOR ONTARIO, [1929] A.C. 656.

FORD MOTOR CO. OF CANADA LTD. AND TOWN OF FORD CITY, *Re*, 63 O.L.R. 410, affirmed by the Supreme Court of Canada: TOWN OF FORD CITY v. FORD MOTOR CO. OF CANADA LTD., [1929] S.C.R. 490.

JACK v. CRANSTON, 35 O.W.N. 159, motion for leave to appeal refused by the Supreme Court of Canada: JACK v. CRANSTON, [1929] S.C.R. 503.

MURPHY v. CITY OF OTTAWA, 63 O.L.R. 247, affirmed by the Supreme Court of Canada: CITY OF OTTAWA v. MURPHY, [1929] S.C.R. 541.

NEWPORT INDUSTRIAL DEVELOPMENT CO. v. HEUGHAN, 62 O.L.R. 364, affirmed by the Supreme Court of Canada: NEWPORT INDUSTRIAL DEVELOPMENT CO. v. HEUGHAN, [1929] S.C.R. 491.

PURDOM v. NORTHERN LIFE ASSURANCE CO. OF CANADA, 63 O.L.R. 12, affirmed by the Supreme Court of Canada: FIDELITY TRUST CO. OF ONTARIO v. PURDOM, [1930] S.C.R. 119.

SIFTON v. CITY OF TORONTO, 63 O.L.R. 397, reversed by the Supreme Court of Canada: SIFTON v. CITY OF TORONTO, [1929] S.C.R. 484.

SMITH & GOLDBERG LTD. v. MOYER & CO., 63 O.L.R. 388, affirmed by the Supreme Court of Canada: MOYER & CO. v. SMITH & GOLDBERG LTD., [1929] S.C.R. 625.

THOMPSON AND CITY OF TORONTO, *Re*, 35 O.W.N. 126, appeal from judgment quashed by the Supreme Court of Canada: CITY OF TORONTO v. THOMPSON, [1930] S.C.R. 120.

WILSON v. WOOLLATT, 62 O.L.R. 620, affirmed by the Supreme Court of Canada: WESTERN RACING ASSOCIATION LTD. v. WOOLLATT, [1929] S.C.R. 483.

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CRAWFORD v. IMPERIAL TRUSTS CO. OF CANADA, 433.

2. *Solicitor Acting for Mortgagee—Misappropriation of Money Intended to be Used for Paying off Earlier Mortgage—Whether Solicitor Agent for*

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Bettles v. Canadian National Railway Co. (1929), 63 O.L.R. 537, reversed. *BETTLES v. CANADIAN NATIONAL RAILWAY CO.*, 211.

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Cross v. Wood (1921), 50 O.L.R. 15, followed. *CRAWFORD v. IMPERIAL TRUSTS CO. OF CANADA*, 433.

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